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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1623

CHESTER SLONE, ABEL CHAPMAN, JR., PHILLIP ANDERSON, CLEDIS KINNEY, ALL CLAIMANTS AND POTENTIAL CLAIMANTS OF WORKMEN'S COMPENSATION BENEFITS UNDER THE LAWS OF THE STATE OF KENTUCKY WHO HAVE SOUGHT, ARE SEEKING OR MAY HEREAFTER SEEK BENEFITS FOR DISABILITY RESULTING FROM THE OCCUPATIONAL DISEASE OF PNEUMOCONIOSIS AND/OR SILICOSIS ARISING OUT OF THEIR EMPLOYMENT IN THE COAL MINES OF KENTUCKY WHERE LAST INJURIOUSLY EXPOSED OR DISABLED DURING THE YEAR 1973, A CLASS REPRESENTED BY THE ABOVE APPELLANTS ..... APPELLANTS

VS:

DESKINS BRANCH COAL COMPANY, KENTUCKY-ELKHORN COALS, INC. KENTUCKY CARBON CORPORATION, HON. JAMES R. YOCOM, COMMISSIONER OF LABOR, COMMONWEALTH OF KENTUCKY AND CUSTODIAN OF THE SPECIAL FUND, SPECIAL FUND, HON. SHELBY T. DENTON, CHAIRMAN, ALFRED A. NAFF, GEORGE B. SIMPSON, CLYDE MULLINS AND GLENN SCHILLING, MEMBERS OF AND COMPRISING THE WORKMEN'S COMPENSATION BOARD AND THE WORKMEN'S COMPENSATION BOARD OF KENTUCKY, AND ED HANCOCK, ATTORNEY GENERAL, COMMONWEALTH OF KENTUCKY; ALL EMPLOYERS OF COAL MINERS IN KENTUCKY AGAINST WHOM CLAIMS HAVE BEEN, ARE BEING OR MAY HEREAFTER BE PROSCUTED UNDER THE WORKMEN'S COMPENSATION LAW OF THE STATE OF KENTUCKY BY COAL MINERS FOR DISABILITY RESULTING FROM PNEUMOCONIOSIS AND/OR SILICOSIS WHERE THE LAST INJURIOUS EXPOSURE OR DISABILITY OCCURRED IN THE YEAR 1973, A CLASS REPRESENTED BY THE EMPLOYERS-APPELLEES DESKINS BRANCH COAL COMPANY, KENTUCKY-ELKHORN COALS, INC., AND KENTUCKY CARBON CORPORATION. ..... APPELLEES

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JURISDICTIONAL STATEMENT

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Appellants appeal from the Judgment of the specially constituted Three Judge United States District Court for the Eastern District of Kentucky entered on March 31, 1975, dismissing appellants' action for declaratory and injunctive relief. Appellants submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and substantial questions are presented.

OPINIONS BELOW

The Opinion of the District Court dismissing appellants' action is not reported. Copies of the Opinion and the order dismissing appellants' action are attached as Appendix A. A copy of the opinion and order certifying the necessity of convening a three-judge court is attached as Appendix B.

JURISDICTION

This action was commenced on behalf of Chester Slone, Abel Chapman, Jr., Phillip Anderson, and Cledis Kinney, individually and on behalf of a class consisting of all claimants and potential claimants of workmen's compensation benefits under the laws of the State of Kentucky who have sought, are seeking or may hereafter seek benefits for disability resulting from the occupational disease of pneumoconiosis and/or silicosis arising out of their employment in

the coal mines of Kentucky where last injuriously exposed or disabled during the year 1973, seeking injunctive and declaratory relief under the authority of 42 USC § 1983, 28 USC §§ 1343 (3) and (4), and 2201 and 2202.

A three-judge court was convened pursuant to 28 USC §§ 2281 and 2284. The suit was brought for injunctive and declarative relief against a Workmen's Compensation Board of Kentucky practice authorized by Kentucky Statute which pays all Kentucky workmen occupationally disabled in 1973 (by accident or occupational disease, including pneumoconiosis) on a percentage of occupational disability basis a maximum of $81.00 per week for life, unlimited medical expenses and increased burial benefits, while withholding the increased benefits (effective January 1, 1973) from only workmen disabled from pneumoconiosis and/or silicosis *as a result of coal mining*. The workers disabled by coal workers pneumoconiosis and/or silicosis are restricted to a maximum of $63.00 per week for 425 weeks, $3,500.00 medical expenses and lesser burial benefits. The basis for the action is that the practice, authorized by Kentucky Law, violates the Fourteenth Amendment to the Constitution of the United States.

The three-judge District Court declared the Kentucky Statute valid and denied injunctive relief. Judgment was dated and entered March 31, 1975. Notice of Appeal was filed April 29, 1975, in the

United States District Court for the Eastern District of Kentucky. It is attached as Appendix C.

Jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 USC §§ 1253 and 2101 (b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal to this court. *United States* v. *Georgia Public Social Services Commission* 371 US 285, 287 (1963); *Florida Lime and Avocado Growers, Inc.*, v. *Jacobsen*, 362 US 73, 75-76 (1960).

STATUTES INVOLVED

Section 37, Chapter 78, Acts of 1972, Kentucky General Assembly; Kentucky Revised Statutes, Chapter 342, effective date clause not compiled (as construed by the Kentucky Court of Appeals in *Maggard* v. *International Harvester Co.*, Ky., 508 S.W. 2d 777 (1974); *Chapman* v. *Eastern Coal Corporation*, Ky., 519 S.W. 2d 390 (1975); and *Fugate* v. *United States Steel Corporation*, Ky., ___S.W. 2d___ (decided May 9, 1975).

It reads as follows:

"Effective date. This Act shall be effective on January 1, 1973; and effective for all claims filed on and after January 1, 1973; provided, however, that in the event federal law specifies that claims covered by provisions of this Act shall be filed with a federal agency such claims

shall continue to be held as required by the federal law until repeal or expirations of the federal law requiring same; then, in that event, the increase in benefits provided herein shall not apply to those claims where benefits are awarded under the federal law. The benefits under the present law KRS Chapter 342 shall apply to those claims. (1972, c. 78, §37; effective date clause, not compiled.)"

The Kentucky cases, construing the statute, are by decision an intricate part of it. They are attached as Appendix D.

QUESTIONS PRESENTED

1. Where a state workmen's compensation scheme provides uniform benefits for disability resulting from injury and/or all occupational diseases based upon total occupational disability or partial occupational disability on a percentage basis, is it impermissible discrimination under the Fourteenth Amendment to increase benefits to all workmen disabled by injury or occupational diseases, including pneumoconiosis, except coal miners disabled by pneumoconiosis?

   (a) Can a state permissibly discriminate between workers occupationally disabled and their families by increasing benefits to some and not others, where the need for benefits and the occupational disabilities are equal?

(b) Can a state permissibly discriminate between workers and their families with respect to the amount of benefits where the occupational disability is equal solely on the basis of the trade or occupation of the worker?

(c) Can a state permissibly discriminate between workers and their families with respect to the amount of benefits where each is equally occupationally disabled by pneumoconiosis, but one contracts it through coal mining and the others through sandblasting, rock quarries, brick kilns or another industry?

(d) Are the needs of coal miners disabled by pneumoconiosis and their families as great as the needs of other workers equally disabled by injury or disease, including pneumoconiosis resulting from stone quarries, brick kilns, etc.?

(e) Where the cost of workmen's compensation benefits is borne by the employers, and not the state, does the granting of lesser benefits to workers of one occupation disabled by a particular occupational disease bear some rational relationship to a legitimate state purpose?

(1) Does the protection of the coal industry at the expense of disabled coal miners promote any legitimate state interest?

(2) Does the denial of equal workmen's compensation benefits, a welfare plan for occupationally disabled workers and their families, endanger fundamental personal rights of the workers and their families suffering the discrimination?

2. Does the integration of a state workmen's compensation plan with the Federal Coal Mine Health and Safety Act of 1969 to provide benefits to coal miners disabled by pneumoconiosis "cure" impermissible state discrimination where both acts combined still provide less benefits than the state act without discrimination and the practical discrimination still exists?

3. Even if an award of benefits under the Federal Coal Mine Health and Safety Act of 1969 would provide equal protection under the state law, is the mere opportunity to assert such a claim under federal law the equivalent of an award so as to give equal protection?

STATEMENT

Chester Slone is a 54 year old coal miner and his wife is his sole dependent.

Abel Chapman, Jr., is a 41 year old coal miner and his sole dependent is his wife, June.

Phillip Anderson is a 51 year old coal miner and his wife, Nell, and son, Phillip, are dependent upon him.

Cledis Kinney is a 43 year old coal miner and his wife, Maxine, and four infant children are dependent upon him.

All four became totally occupationally disabled in 1973 while working in the coal mines of Kentucky as a result of coal workers pneumoconiosis.

By statute and by administration all workers disabled in 1973 by injury and occupational disease, including pneumoconiosis, receive benefits for total permanent disability of eighty-one dollars ($81.00) per week for life, unlimited medical expenses and the same weekly survivor benefits of eighty-one dollars ($81.00) a week for dependents. The sole exception is coal miners disabled by pneumoconiosis in 1973, who by virtue of Section 37, Chapter 78, Acts of 1972, Kentucky General Assembly, were denied the increase in benefits granted all other workers. The appellants receive only sixty-three dollars ($63.00) per week for up to 425 weeks, $3,500.00 medical expenses and reduced survivor benefits for dependents. *Maggard* v. *International Harvester Co.*, Ky., 508 S.W. 2d 777 (1974); *Chapman* v. *Eastern Coal Corporation,* Ky., 519 S.W. 2d 390 (1975).

The record discloses some 873 claimants in the class represented by the appellants, with other future potential unknown claimants. The employers of these claimants number 169, represented as a class by the appellee coal companies.

In Workmen's Compensation parlance, Kentucky is a general coverage state, with uniform benefits depending upon the percentage of occupation disability. By general coverage is meant that all disability resulting from injury and occupational disease are covered, the only requirement being that the disability result therefrom. See *Chapman, supra,* 519 S.W. 2d at 390, 391 (50a).

By the time of the 1972 Act in question, "pneumoconiosis" in all forms was covered. Pneumoconiosis is a broad medical term defined in Stedman's Medical Dictionary, 22nd Edition, page 990, as

> "pneumoconiosis, pl. pneumoconiosises (nu' mo-ko-ne-o' sis) [G pneumon, ling, + koms, dust] Pneumoconiosis; mason's lung, a figrous induration of the lungs due to irritation caused by the inhalation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc.; the most prominent symptoms are pain in the chest, cough, little or no expectoration, dyspnea, reduced thoracic excursion, sometimes cyanosis, and fatigue after slight exertion."

Among the more prevalent occupational disorders within the pneumoconiosis ambit are silcosis (coal mining, stone cutting, sand blasting, brick kilns, etc.); anthracosis (coal mining, commonly called

"black lung"); asbestosis (asbestos workers, sometimes called amianthosis); talc workers disease; bauxite workers disease; and aluminosis (aluminum workers disease, also called *a.* pulmonum). Dorland's Illustrated Medical Dictionary, Twenty-fifth Edition gives the most comprehensive definition of pneumoconiosis and the various occupational pulmonary dysfunctions embraced by it. Coal miners get a double exposure, coal dust and silica (from sanding mine tracks for traction and working in sandstone tops and bottoms in mines).

The Chairman and members of the Kentucky Workmen's Compensation Board, charged with administering the act, frankly admitted the discrimination on discovery but based it on Section 37, Chapter 78, 1972 Acts, Kentucky General Assembly, as construed by the Court of Appeals of Kentucky in *Maggard* v. *International Harvester Co., supra.* The Board openly affirmed it would continue to so administer the act. The 873 present claimants, to the extent successful, have received or will receive a discriminatory award, on either a total or partial occupational disability basis.

The Kentucky Workmen's Compensation Board found each named appellant totally and permanently occupationally disabled. The discrimination in state benefits in the case of the four was demonstrated by exhibits filed with the Complaint. They are attached as Appendix E. The substance is that each appellant can expect only $63.00 per week for 425 weeks, or

$26,775.00, as total subsistence benefits for them and their families. Without discrimination the benefits would be $81.00 per week for life, or an expected $76,195.08 for Slone, an expected $115,619.40 for Chapman, an expected $85,082.40 for Anderson, and an expected $109,512.00 for Kinney. Additional discrimination exists in medical expenses, burial expenses and death benefits.

All state payments for pneumoconiosis are made by the employer and the Special Fund in varying percentages depending on whether there is multiple exposure. KRS 342.316 (13). The Special Fund is funded by assessment on all employers regardless of amount. KRS 342.122. No state monies are involved.

As coal miners afflicted with pneumoconiosis appellants are eligible to apply for "Federal Black Lung Benefits" under the Federal Coal Mine Health and Safety Act of 1969, 30 USC §§ 801, 901 et seq. It is this *eligibility* which prohibits their receiving the increased benefits under Kentucky law. *Maggard* v. *International Harvester Co., supra* (33a); *Chapman* v. *Eastern Coal Corporation, supra* (40a). The Kentucky Court there expressly rejected the contention that increased benefits would be denied only where there is an actual award and payment of Federal Black Lung Benefits. See *Maggard,* at 508 S.W. 2d 783.

The four named appellants had applied for and been denied Federal Black Lung Benefits at the time

this action was commenced. In the interim Chester Slone appealed and he alone has been awarded Federal Black Lung Benefits. He received $254.70 per month to October 1973, $266.40 per month to October 1974, and $281.10 per month thereafter (miner and one dependent). This compares with $273.00 per month received by Kentucky coal miners disabled by pneumoconiosis and $351.00 per month received by all other workers.

Even if Chapman, Anderson and Kinney had not been denied Federal Black Lung Benefits, the comparable table of benefits would read:

BENEFITS PER MONTH

APPELLANTS	KENTUCKY		FEDERAL
	COAL MINERS (1)	ALL OTHERS	BLACK LUNG (2)
Slone —	$273.00	$351.00	$254.70, $266.40 and $281.00
Chapman —	$273.00	351.00	Same as Slone
Anderson —	$273.00	351.00	$297.10, $310.80 and $328.00
Kinney —	$273.00	351.00	$339.50, $355.20 and $374.80

(1) Coal miners disabled by pneumoconiosis only.

(2) Rates fluctuate based upon federal employer disability benefits, Grade GS-2. 30 USC § 922 (a); Federal Register, Vol. 39, No. 141, Monday, July 22, 1974, based on dependency.

The most recent rates for Black Lung Benefits are attached as Appendix F.

The comment in Footnote 2 by the Kentucky Court of Appeals in *Fugate* v. *United States Steel Corporation*, Ky., ____S.W. 2d____ (decided May 9, 1975) Appendix D (57a) graphically demonstrates the discrimination even where federal benefits are awarded.

The Federal Black Lung Benefits are not in addition to state workmen's compensation payments. To the contrary 30 USC § 922 (b) expressly provides that ". . . benefit payments . . . shall be reduced . . . by an amount equal to any payment received . . . under the workmen compensation . . . laws of his State on account of the disability of such miner . . .". So any Federal Black Lung Benefits awarded a miner which are less than state workmen compensation benefits are devoured by the offset.

The Federal Black Lung Act is not a Workmen's Compensation Act. 30 USC § 922 (b), as amended May 19, 1972. It provides only for benefits for "total disability" of a miner due to pneumoconiosis. 30 USC § 922 (a). It makes no provision for partial occupational disability. Kentucky's workmen's compensation law does provide for partial occupational disability on the basis of pneumoconiosis, giving a standard on which to base a percentage of disability. KRS 342.730 (b). A coal miner partially disabled by pneumoconiosis

may be denied federal benefits but awarded state benefits on a percentage basis. Any percentage would be based upon the discriminatory scale of $63.00 x the percentage per week for 400 weeks.

The criterion for "total disability" differs materially between the Federal Black Lung Act and the Kentucky Workmen's Compensation Law. The federal criterion is based on "total disability" as defined by the Secretary of Health, Education and Welfare. The federal requirement is judged solely on medical evaluation. 300 USC § 921; *National Independent Coal Operator's Ass'n.* v. *Brennan,* 372 F. Supp. 16, 23 (D.C., 1974). The Kentucky Workmen's Compensation Act, a true compensation law, bases total disability upon *wage loss,* and the coal miner may receive maximum compensation if his wage loss equals the maximum benefits even though he is not "totally" disabled by federal standards. KRS 342.620 (9).

It should be noted here that Federal Black Lung claims filed after December 31, 1973, are governed by the Longshoremens and Harbor Worker's Compensation Act. The procedure is changed, the rights are changed and the liability is shifted from the federal government to the coal operator. 30 USC §§ 932 et seq.

The latest statistics demonstrate the uncertainty of federal black lung claims. As of December, 1974, sixty thousand five hundred (60,500) Kentuckians

had filed claims. Of these, thirty-four thousand four hundred (34,400) were allowed and twenty-six thousand one hundred (26,100) were denied. Nationally 557,000 were filed, 367,900 were allowed and 188,900 were denied.

The Complaint as amended charges that the Kentucky statute deferring increased benefits solely to coal miners disabled by pneumoconiosis constitutes inviduous discrimination within the ambit of the Fourteenth Amendment to the United States Constitution. It seeks a declaration that the statute deferring increased benefits is unconstitutional and seeks injunctive relief against its administration by the Kentucky Workmen's Compensation Board. The appellants also seek restitution of their civil rights through an order requiring that Board to rescind all discriminatory awards and make new awards on the same basis as all other 1973 Kentucky workmen's compensation claimants similarly disabled.

After the three-judge court was convened, a hearing was held to determine whether abstention was appropriate. The court determined abstention was proper and so ordered to give the Court of Appeals of Kentucky an opportunity to decide the constitutional issue in *Chapman* v. *Eastern Coal Corporation,* Ky., 519 S.W. 2d 390 (decided February 7, 1975). The Kentucky Court held the discrimination permissible because there was "rational justification". As put by the Kentucky

Court, "The goal here seems to have been to defer placing an economic burden upon the coal industry until it was no longer being carried on other shoulders (the federal government)". Id. 519 S.W. 2d at 393 (49a).

Appellants moved the three-judge court to redocket the case, comply with the class requirements of FRCP 23 and proceed to trial.

The Court, *sua sponte*, rendered an opinion and entered a final judgment on March 31, 1975, affixed as Appendix A, upholding the Kentucky statute and finally dismissing the action. The three-judge court found a legitimate state purpose for the discrimination, asserting:

> "The Kentucky Legislature had a legitimate interest in providing that a group of coal miners whose last exposure and onset of disability occurred during the limited time when benefits were available under the Federal Black Lung Act would not, by virtue of the duplication of benefits under Kentucky's Workmen's Compensation Act and the federal law, qualify for total benefits in excess of all other Kentucky Compensation claimants". Appendix A, page 7a.

The three-judge court so held despite the offset provision in the Federal Black Lung Act, 30 USC § 922 (b).

Appellants contend the discrimination is inviduous, impermissible and a violation of their civil rights under the Fourteenth Amendment to the United States Constitution.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I

Workmen's Compensation Benefits, state administered to meet the needs of disabled or deceased workmen and their families are in the nature of an occupational welfare program. As such, recipients will be protected against invidious discrimination by the state. *Weber* v. *Aetna Casualty and Surety Company*, 406 U.S. 164, 171, 172 (1972).

II

The Kentucky Workmen's Compensation Law, KRS Chapter 342, is a uniform benefits act, based upon total or partial permanent disability, with appropriate benefits on a percentage of occupational disability basis. KRS 342.730 (1) (a)(b). It includes all occupational diseases. KRS 342.316 (4). All forms of pneumoconiosis are embraced, including "silicosis, coal workers pneumoconiosis, or any other compensable pneumoconiosis". KRS 342.316 (7). See

also subsections (5) and (6). (50a) Disability is defined in terms of "decrease of wage earning capacity". In case of partial disability it is determined either on wage loss or percentage of body functional disability, whichever is greater, KRS 342.620 (9). All Kentucky workers, save only these appellants, are awarded benefits uniformly on an equal basis. The denial of increased benefits to them violates the requirement of the Fourteenth Amendment of the United States Constitution "that all persons similarly circumstanced shall be treated alike". *Reed* v. *Reed,* 404 U.S. 71, 76 (1971). See also *Weber* v. *Aetna Casualty and Surety Company,* 406 U.S. 164, 173 (1972); *Chatman* v. *Barnes,* 357 F. Supp. 9 (1973).

III

". . . there can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well being . . ." of disabled coal miners and their families as to those who are disabled by injury, occupational disease and pneumoconiosis in other industries. *New Jersey Welfare Rights* v. *Cahill,* 411 U.S. 619, 621 (1973).

IV

The Kentucky legislature was not addressing the problem of workmen's compensation benefits one

step at a time in increasing many fold benefits for injury and occupational diseases, including pneumoconiosis, retaining the substantially lesser benefits only for coal miners with pneumoconiosis.

In *Jefferson* v. *Hackney,* 406 U.S. 535 (1972), this court approved different benefits to recipients of Old Age Assistance, Aid to the Blind, and for Permanently and Totally Disabled and Aid to Families with Dependent Children. The court approved differing aid in each field, espousing the "one step at a time" doctrine. Id. 406 U.S. 546.

This case differs in that the Kentucky legislature had taken the "step" providing benefits for occupationally disabling pneumoconiosis. And Kentucky has put compensable pneumoconiosis on the same basis as all other injuries and occupational diseases. The sole discriminatory exception is coal miners disabled thereby.

Kentucky does not thereby . . . "select one phase of one field and apply a remedy there, neglecting the others." Id. 406 U.S. 546. It *has* selected one phase of one field, pneumoconiosis, and it has applied a remedy there. But within that field it has applied the remedy in an uneven and discriminatory manner, denying the appellant coal miners equal protection under the law.

V

There is no rational relationship between the discriminatory scheme and any legitimate state interest.

The purpose of the workmen's compensation law is to provide for the health and well being of Kentucky disabled and deceased workers and their families. The need of each worker and his family is equally great.

There is no conceivable rational basis for the exclusion from increased benefits of only coal miners disabled by pneumoconiosis. Coal miners disabled by injury or other occupational disease receive the increased benefits. So do all other workers disabled by pneumoconiosis, by other occupational disease or by injury. It is only the coal miner and only disabling pneumoconiosis, combined, which receive the discriminatory treatment. Absent a rational basis for this classification, it is constitutionally impermissible and must fall. *U.S. Dept. of Agriculture* v. *Moreno,* 413 U.S. 528, 538 (1973); *Hagans* v. *Levine,* 415 U.S. 528, 539 (1974).

There is no state money involved. The program is totally financed by employers and administered by the state.

The legitimate state purpose found by Kentucky's highest court was ". . . to leave any additional financial burden with respect to black lung claimants upon the taxpayers of the United

States instead of shifting it to the coal mining industry so long as Congress saw fit to make the public money available." *Chapman* v. *Eastern Coal Corporation,* Ky., 519 S.W. 2d 390, 392 (1975). (45a) We do not believe this to be a legitimate state objective. Certainly the classification is totally unrelated to the object of the legislation, providing for the health and well being of Kentucky workers occupationally disabled.

The classification is unconstitutionally arbitrary from any view. There is no reasonable basis for singling out only coal miners disabled by pneumoconiosis for reduced benefits. And it is even more arbitrary to discriminate for the purpose of protecting the coal industry at the expense of the disabled coal miner.

This case is totally unlike *Geduldig* v. *Aiello,* 417 U.S. 484 (1974) where a state welfare program complimenting workmen's compensation for non-occupational disability was not extended by California to cover disability resulting from pregnancy. The election of the state not to so extend the coverage to this class of non-occupational disability is within the "selection of one phase of one field" concept.

While a state is not required to choose between every aspect of a problem or not attacking it at all, (*Dandridge* v. *Williams,* 397 U.S. 471, 486-487 (1970) once the attack is launched the benefits must

be spread with an even hand among those similarly circumstanced. *Weber* v. *Aetna Casualty and Surety Company*, 406 U.S. 164, 172, 173 (1972). And where the benefits provided are in the nature of welfare for disabled workers and their dependents, "under-inclusive" classification is impermissible. *Jiminez* v. *Weinberger*, 417 U.S. 628, 637 (1974). That is this case.

In the Kentucky scheme of compensation, the class of occupational disability covered is that resulting from injuries and occupational diseases. In every other case, the occupational disability is equally assessed, the benefits are equally dispensed and the needs of the recipients are equal.

The Kentucky Court sought to find a permissible class in "pneumoconiosis". *Chapman* v. *Eastern Coal Corporation, supra* at 519 S.W. 2d 393 (1975). We concede Kentucky could have excluded pneumoconiosis under *Geduldig* v. *Aiello, supra,* but having included it, the benefits must be administered by Fourteenth Amendment criteria. The "underinclusive" classification, by excluding coal miners, is constitutionally impermissible. *Jiminez* v. *Weinberger*, 416 U.S. 628, 637 (1974).

VI

The legitimate state interest given by the court below was to prevent coal miners from receiving

double benefits under state workmen's compensation and the federal black lung program (Appendix A, page 7a), but this is factually unsound. Under 30 USC § 922 (b) federal benefits are reduced dollar for dollar by state payments. The shameful situation here is that the discriminatory state benefits and federal benefits, with the offset, do not near reach the non-discriminatory state benefits. The Court below simply misconstrued the facts and did not reach the issue.

VII

The Kentucky court would uphold the act as a permissible integration of state and federal benefits under *Richardson* v. *Belcher*, 404 U.S. 78 (1971). See *Chapman* v. *Eastern Coal Corporation*, Ky., *supra*, at 519 S.W. 2d 392-393 (49a)

The recipients of social security benefits in *Richardson* v. *Belcher, supra,* each received like sums, though some came from state workmen's compensation because of the offset provision in the social security law. Since all like circumstanced received equal benefits the offset provision did not deny equal protection.

There is nothing close to equal benefits here. Slone alone is receiving federal benefits, from $254.70 per month to $281.00 per month. He receives $273.00 per month state benefits (for only

425 weeks). With the offset, he has received only $273.00 per month until federal benefits exceeded the state benefits to increase him to $281.00 per month. In the interim others receiving state benefits have been paid $351.00 per month. The other named appellants have been denied federal benefits.

A simple exercise in arithmetic will demonstrate integration of both programs has only sustained the inequality of the state program. Discrimination has not been lessened in any appreciable degree by the integration even where federal benefits have been awarded.

Another fatal failing of the integration theory is that there is no assured integration of benefits. All that is required to reduce the coal miners benefits is that he be "eligible" to apply for federal benefits, whether or not he is awarded benefits. *Maggard* v. *International Harvester Company*, Ky., 508 S.W. 2d 777, 783, 785 (1974). (33a, 37a) Thus, his state benefits are reduced solely due to his federal eligibility without any assurance of a federal award. Experience dictates only approximately two of three applying will receive an award, which will not provide equal protection in any event.

We suggest that a claim under federal law is not equal to a non-discriminatory award under state law, especially where the state award will be substantially more in any event. A claim in the bush is not equal to an award in the hand.

The state benefits are not the only thing superior to the federal program. Kentucky provides benefits on an occupational loss basis while federal benefits are only on a "total disability" basis. A Kentucky workmen can receive partial disability benefits while being denied federal benefits. Kentucky's program is a workmens' compensation program, while the federal program is a welfare program based on total disability. Compare KRS 342.620 (9) and 342.730 (b) with 30 USC §922(a). The are clearly dissimilar in purpose and basis for benefits. Kentucky uses wage loss while the federal program is based on medical evaluation of total disability. 30 USC § 921. They are different benefits awarded on different criteria in different forms under different rules. Eligibility to claim the federal benefits cannot be equated to an award of state benefits.

Equal protection is a personal, pragmatic, practical concept. "Artifical standards" will not suffice. A will of the wisp opportunity to assert a federal claim, unequal if granted, is not equal protection under state law. In its search for equal protection, this court will sift through the integrated statutes, state and federal, to insure constitutional conformity. "What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution."

Gregg Dyeing Co. v. *Query*, 286 U.S. 472, 480 (1932). The Kentucky statute clearly fails this test.

VIII

The questions present are substantial to these appellants. By Kentucky Department of Labor estimate Kentucky coal miners disabled in 1973 by pneumoconiosis will lose $57,420,000.00 through the discrimination. Volume 38, No. 3, Kentucky Bar Journal, page 27, Footnote 6 (October, 1974). And under the decision in *Fugate* v. *United States Steel Corporation*, Ky., ____S.W. 2d____ (decided May 9, 1975) (54a), the discrimination will continue in the case of coal miners disabled in 1974, 1975, *Ad infinitum*.

The issues here are of great legal significance, for this court is here for the first time confronted with

(1) Discrimination in workmen's compensation benefits based solely on trade or occupation.

(2) Integration of state and federal statutes where the integrated benefits are less than those under the state law alone.

These issues demand consideration by this court and a direct answer.

CONCLUSION

The questions involved are novel and substantial. The discrimination is clear and revolving, invidious from any standpoint. Probable jurisdiction should be noted and this cause should proceed accordingly.

Respectfully submitted,

C. KILMER COMBS

Attorney for Appellants

APPENDIX

"A"

Filed Mar. 31, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 74-113

CHESTER SLONE, ET AL, PLAINTIFFS,

VS:

DESKINS BRANCH COAL CO.,
ET AL, DEFENDANTS.

ORDER

Upon the Court's own motion,

IT IS ORDERED HEREIN AS FOLLOWS:

(1) That the per curiam opinion attached hereto be, and the same hereby is, FILED as of this date.

(2) That judgment be entered on behalf of the defendants.

(3) That this action be, and it hereby is, DISMISSED at the cost of the plaintiffs.

This the 31 day of March, 1975.

/s/ H. David Hermansdorfer,
H. David Hermansdorfer, Judge

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court

By /s/ Linda R. Young D.C.

Notice is hereby given of the
entry of this order or judgment
on April 1, 1975
Davis T. McGarvey, Clerk

By: /s/ Linda L. Young D.C.

* * * * * * * *

Filed Mar. 31, 1975

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY
Pikeville

CHESTER SLONE, et al. Plaintiffs

v.

DESKINS BRANCH COAL Co.,
et al. Defendants

CIVIL ACTION NO. 74-113

Decided and Filed_____

BEFORE: LIVELY, Circuit Judge; MOYNAHAN and HERMANSDORFER, District Judges.

PER CURIAM. This case was filed as a class action seeking declaratory and injunctive relief because of the alleged unconstitutionality of Section 37 of Senate Bill 184 (Chapter 78, 1972 Acts) which was enacted by the General Assembly of the Commonwealth of Kentucky in 1972 as an amendment to the Workmen's Compensation Law and became effective January 1, 1973. A three-judge court was convened pursuant to 28 U.S.C. § 2281 and § 2284. The Honorable Mac Swinford, who was originally designated as a member of this court, died on February 3, 1975. The Chief Judge of the Sixth Circuit has issued a new designation of the three judges shown above.

The issues in the case were briefed and oral arguments were heard on November 21, 1974. It was then determined that the same issues relating to the constitutionality of Senate Bill 184 were before the Court of Appeals of Kentucky. Accordingly, on November 27, 1974 this court entered an order abstaining "from present consideration of this case until the Kentucky Court of Appeals has been

afforded an opportunity to act." The Court of Appeals of Kentucky has rendered a decision in *Chapman* v. *Eastern Coal Corporation, et al.*, No. 74-655 (February 7, 1975), in which it upheld the constitutionality of Section 37 of the 1972 amendment. The case has been redocketed in this court for further consideration.

The essential thrust of the plaintiffs' claim is that Section 37 violates the equal protection clause of the Fourteenth Amendment to the United States Constitution by treating a group of coal miners who are covered by the Federal Black Lung Act and who apply for workmen's compensation benefits after January 1, 1973 differently from all other persons entitled to workmen's compensation benefits under Kentucky law. Prior to the 1972 amendment the maximum benefits payable for total and permanent disability under the Workmen's Compensation Act of Kentucky were $63.00 per week for 425 weeks, and medical expenses as reasonably required not to exceed $3,500.00. Under the 1972 amendment the maximum payable to a workman whose last injurious exposure and actual disability occurred in 1973 was increased to $81.00 per week for life and necessary medical expenses without dollar limit. Section 37 of the 1972 act reads as follows:

> "Effective date. This Act shall be effective on January 1, 1973; and effective for all claims filed on and after January 1, 1973; provided, however, that in the event federal law specifies that claims covered by provisions of this Act shall be filed with a federal agency such claims shall continue to be filed as required by the federal law until repeal or expiration of the federal law requiring same; then, in that event, the increase in benefits provided herein shall not apply to those claims where benefits are awarded under the federal law. The benefits under the present law KRS Chapter 342 shall apply to those claims."

The Court of Appeals of Kentucky construed the 1972 amendment in *Maggard* v. *International Harvester Co.*, 508 S.W.2d 777 (1974). It found that the legislature, in enacting the 1972 amendment, sought to defer the increase in benefits for those covered by the federal act until the time that act expired. All other increases were made effective January 1, 1973. Those claimants who were covered under the federal black lung program would be required to look to that program for increased benefits so long as it remained in effect. Otherwise they would have been in position to receive increased benefits under the Kentucky law and additional benefits for the same work-related disability under the federal law.

Every classification established by a state legislature does not constitute invidious discrimination prohibited by the equal protection clause. The legislature may deal with a particular problem as it sees fit so long as there is a rational relationship

between the state purpose being served and any classifications created in achieving that purpose. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955). In *Dandridge* v. *Williams*, 397 U.S. 471 (1970), the Supreme Court held that the same constitutional standard applicable to state regulation of business or industry should be applied to the administration of welfare programs. It quoted with approval from *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961), "A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *Id.* at 485. In the very recent decision in *Geduldig* v. *Aiello*, 417 U.S. 484, 495 (1974), Justice Stewart wrote for the Court, "Particularly with respect to social welfare programs, so long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point."

The Supreme Court has accorded similar treatment to federal programs, holding that Congress has wide latitude in the field of social legislation. It has found no violation of the equal protection concepts implicit in the due process clause of the Fifth Amendment in Social Security classifications which are rationally based. *Richardson* v. *Belcher*, 404 U.S. 78 (1971); *Flemming* v. *Nestor*, 363 U.S. 603 (1960). The Court of Appeals for this Circuit has held that there is no violation of equal protection in a provision which requires an offset of workmen's compensation benefits against those

provided for disability under the Social Security program without requiring a similar offset for payments received from other sources such as private insurance or recovery in a tort action. *Lofty* v. *Richardson*, 440 F.2d 1144 (6th Cir.), *cert. denied*, 404 U.S. 985 (1971).

The Kentucky legislature had a legitimate interest in providing that a group of coal miners whose last exposure and onset of disability occurred during the limited time when benefits were available under the Federal Black Lung Act would not, by virtue of the duplication of benefits under Kentucky's Workmen's Compensation Act and the federal law, qualify for total benefits in excess of all other Kentucky compensation claimants. The method which the legislature chose to avoid this result was deferral of the effective date of the statute increasing state compensation benefits insofar as it related to claimants covered by the Federal Black Lung Act. *Maggard* v. *International Harvester Co.*, *supra*, 508 S.W.2d at 782. We hold that there is a rational relationship between this statutory scheme and the legitimate state interest which it was intended to serve.

It is ordered that this action be dismissed at the cost of the plaintiffs.

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court

By /s/ Linda L. Young D. C.

Copies to:
Baird & Baird
Cyril Shadowen
Thomas R. Emerson
C. Kilmer Combs

4/1/75, L.L.Y.

* * * * * * *

"B"

Filed Mar. 5, 1975

DESIGNATION
AMENDED

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

NO. 73-113

CHESTER SLONE, ET AL.

V.

DESKINS BRANCH COAL COMPANY

Requesting Judge:
Honorable H. David Hermansdorfer
Eastern District of Kentucky

District Judge:
Honorable Bernard T. Moynahan, Jr.
Eastern District of Kentucky

Circuit Judge:
Honorable Pierce Lively

Having been notified by the requesting judge shown above, that the complaint in the above entitled action is one required by an Act of Congress to be heard and determined by a District Court of three Judges, I, Harry Phillips, Chief Judge of the Sixth Circuit, hereby designate the three judges named above to constitute the said Court and to hear and determine this action in accordance with 28 U. S. C. § 2284.

This designation and composition of the three judge court is not a prejudgment, express or implied, as to whether this is properly a case for a three judge rather than a one judge court. This is a matter best determined by the three judge court.

Dated at Nashville, Tennessee, this 3rd day of March, 1975.

/s/ Harry Phillips
Chief Judge, United States Court
Of Appeals For The Sixth Circuit

3/6/75
Copies to:
C. Kilmer Combs
Thomas R. Emerson
Cyril Shadowen
Baird & Baird
Judge Hermansdorfer
Judge Moynahan
Judge Lively

DBW

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court

By /s/ Dorothy B. Wood D.C.

* * * * * * *

"C"

Filed April 29, 1975

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

ACTION #74-113

CHESTER SLONE, ABEL CHAPMAN, JR., PHILLIP ANDERSON, CLEDIS KINNEY, ALL CLAIMANTS AND POTENTIAL CLAIMANTS OF WORKMEN'S COMPENSATION BENEFITS UNDER THE LAWS OF THE STATE OF KENTUCKY WHO HAVE SOUGHT, ARE SEEKING OR MAY HEREAFTER SEEK BENEFITS FOR DISABILITY RESULTING FROM THE OCCUPATIONAL DISEASE OF PNEUMOCONIOSIS AND/OR SILICOSIS ARISING OUT OF THEIR EMPLOYMENT IN THE COAL MINES OF KENTUCKY WHERE LAST INJURIOUSLY EXPOSED OR DISABLED DURING THE YEAR 1973, A CLASS REPRESENTED BY THE ABOVE APPELLANTS — APPELLANTS

VS: NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

DESKINS BRANCH COAL COMPANY, KENTUCKY-ELKHORN COALS, INC. KENTUCKY CARBON CORPORATION, HON. JAMES R. YOCOM, COMMISSIONER OF LABOR, COMMONWEALTH OF KENTUCKY AND CUSTODIAN OF THE SPECIAL FUND, SPECIAL FUND, HON. SHELBY T. DENTON, CHAIRMAN, ALFRED A. NAFF, GEORGE B. SIMPSON, CLYDE MULLINS AND GLENN SCHILLING, MEMBERS OF AND COMPRISING THE WORKMEN'S COMPENSATION BOARD AND THE WORKMEN'S COMPENSATION BOARD OF KENTUCKY, AND ED HANCOCK, ATTORNEY GENERAL, COMMONWEALTH OF KENTUCKY; ALL EMPLOYERS OF COAL MINERS IN KENTUCKY AGAINST WHOM CLAIMS HAVE BEEN, ARE BEING OR MAY HEREAFTER BE PROSECUTED UNDER THE WORKMEN'S COMPENSATION LAW OF THE STATE OF KENTUCKY BY COAL MINERS FOR DISABILITY RESULTING FROM PNEUMOCONIOSIS AND/OR SILICOSIS WHERE THE LAST INJURIOUS EXPOSURE OR DISABILITY OCCURRED IN THE YEAR 1973, A CLASS REPRESENTED BY THE EMPLOYERS-APPELLEES DESKINS BRANCH COAL COMPANY, KENTUCKY-ELKHORN COALS, INC., AND KENTUCKY CARBON CORPORATION — APPELLEES

1. The parties taking this appeal are Chester Slone, Abel Chapman, Jr., Phillip Anderson, Cledis Kinney, and all claimants and potential claimants of Workmen's Compensation Benefits under the laws of the State of Kentucky who have sought, are seeking or may hereafter seek benefits for disability resulting from the occupational disease of pneumoconiosis and/or silicosis arising out of their employment in the coal mines of Kentucky where last injuriously exposed or disabled during the year 1973, a class represented by the individual parties taking the appeal.

2. The parties taking this appeal hereby appeal to the Supreme Court of the United States from the entire final judgment, in the form of an order dismissing finally the complaint as amended, dated and entered by the Three Judge Federal Court on March 31, 1975, in Civil Action No. 74-113, United States District Court for the Eastern District of Kentucky, at Pikeville, styled Chester Slone, et al v. Deskins Branch Coal Company, et al, and more fully styled above.

3. This appeal is taken pursuant to United States Code, Title 28, Section 1253.

/s/ C. Kilmer Combs

C. KILMER COMBS
KELSEY E. FRIEND LAW FIRM
P. O. BOX 512
PIKEVILLE, KENTUCKY 41501
ATTORNEYS FOR APPELLANTS

I, C. KILMER COMBS, attorney for appellants herein, and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 26th day of April, 1975, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On James R. Yocom, Commissioner of Labor of Kentucky and Custodian of the Special Fund, by mailing three copies in a duly addressed envelope with first class postage prepaid to Cyril E. Shadowen, attorney for the Commissioner of Labor, Department of Labor, Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40202, his attorney of record.

2. On Deskins Branch Coal Company; on Kentucky-Elkhorn Coals, Inc.; and on Kentucky Carbon Corporation, individually and as representatives of the class of employers named as appellees in the caption above, by delivering to counsel three copies thereof at the office of William J. Baird, Baird and Baird, attorneys, Pikeville National Bank and Trust Company Building, Pikeville, Kentucky 41501, and by mailing three copies thereof in a duly addressed envelope with first class postage prepaid to William J. Baird, Baird and Baird, Attorneys, Post Office Box 351, Pikeville, Kentucky 41501, their attorneys of record.

3. On Shelby T. Denton, Chairman, Alfred A. Naff, George B. Simpson, Clyde Mullins, and Glen

Shilling, Members, comprising the Workmen's Compensation Board of Kentucky, and Ed W. Hancock, Attorney General of Kentucky, by mailing six copies thereof in a duly addressed envelope with first class postage prepaid to Thomas R. Emerson, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601, their attorney of record.

4. All parties required to be served have been served.

/s/ C. Kilmer Combs

* * * * * * *

"D"

OTIS MAGGARD, Appellant,

v.

INTERNATIONAL HARVESTER COMPANY et al., Appellees (two cases).

JAMES R. YOCOM, Appellant,

v.

OTIS MAGGARD et al., Appellees.

Court of Appeals of Kentucky.
Feb. 1, 1974.
As Modified on Denial of Rehearing
April 12, 1974.

Consolidated appeals by workmen's compensation claimant and the Special Fund from a judgment of the Harlan Circuit Court, F. Byrd Hogg, Special Judge, affirming a decision of the Workmen's Compensation Board awarding claimant compensation in the sum of $60 per week for 425 weeks and assessing liability for entire award against the Special Fund. The Court of Appeals, Catinna, C., held that claimant was entitled to award of $63 per

week and that Special Fund was liable for such amount.

Affirmed in part; reversed in part with directions.

1. **Labor Relations — 7**

Purpose of subchapter of Coal Mine Health and Safety Act dealing with black lung benefits is to guarantee adequate benefits upon a permanent basis and not merely during effective period of Act. Federal Coal Mine Health and Safety Act of 1969, § 401 et seq. as amended 30 U.S.C.A § 901 et seq.

2. **Workmen's Compensation — 869**

In light of fact that only duplication in Workmen's Compensation Act and federal act was the provision of Coal Mine Health and Safety Act for payment of black lung benefits, bill which provided that amendments to Workmen's Compensation Act were effective for claims filed on or after January 1, 1973 except that claims filed with federal agency were to continue to be filed as required by federal law until expiration of federal law and that increases in benefits did not apply to claims where benefits were awarded under federal law deferred payments of increased benefits for occupational pneumoconiosis under amendments for so long as

there was an effective federal black lung program. Federal Coal Mine Health and Safety Act of 1969, §§ 401 et seq., 411, 412, 413(a, c), 421, 421(a, b), 422 as amended 30 U.S.C.A. §§ 901 et seq., 921, 922, 923(a, c), 931, 931(a, b), 932; Acts 1972, c. 78, § 37; KRS 342.316(13)(a).

3. Workmen's Compensation — 869

Under bill providing that 1972 amendments to Workmen's Compensation Act increasing benefits for occupational pneumoconiosis were not effective until expiration of effective federal black lung program and that benefits under 1970 act were applicable to claims when benefits were awarded under federal program, black lung claimant under Workmen's Compensation Act was bound to proceed under 1970 act until such time that federal black lung program was terminated. Acts 1972, c. 78, § 37; Federal Coal Mine Health and Safety Act of 1969, § 401 et seq. as amended 30 U.S.C.A § 901 et seq.; KRS 342.316(13)(a).

4. Workmen's Compensation — 1795

Under bill deferring effective date of 1972 amendments to Workmen's Compensation Act increasing benefits for occupational pneumoconiosis until expiration of federal black lung program and providing that benefits under 1970 act were

applicable to claims where benefits were awarded under federal program, awards made pursuant to 1970 act are final and case cannot be reopened so to increase the award to comply with amendment even if federal black lung claim was denied. Acts 1972, c. 78, § 37; KRS 342.125, 342.316(13)(a).

5. Workmen's Compensation — 55

Law in effect on date of injury or on date of last exposure to disease is the law that fixes rights of claimant, and filing date of claim has no bearing upon award other than whether there has been compliance with the statute of limitations. KRS 342.316(5).

6. Workmen's Compensation — 869

Even though claimant whose last exposure to pneumoconiosis was in January 1973 was not entitled to increased state occupational pneumoconiosis benefits which did not become effective until January 1974, where claimant who was totally and permanently disabled by the disease was entitled to benefits under 1970 act and such act provided that maximum weekly benefit should not exceed 55% of 85% of average weekly wage and average weekly wage was $135.01, maximum amount of claimant's benefits was $63 per week for 425 weeks. KRS 342.095, 342.143.

7. **Workmen's Compensation — 73**

Bill which provided that 1972 amendments to Workmen's Compensation Act increasing benefits for occupational pneumoconiosis were not effective until after expiration of federal black lung program did not defer effective date of amendment providing that occupational pneumoconiosis benefits were payable out of Special Fund for all claims filed prior to January 1, 1973 and the 75% was payable by the Special Fund and 25% by the employer for all claims filed thereafter. Acts 1972, c. 78, § 37, KRS 342.316(13)(a).

8. **Workmen's Compensation — 1030.3**

Under statute providing that benefits for occupational pneumoconiosis are payable out of Special Fund for all claims filed prior to January 1, 1973 and the 75% is payable by Special Fund and 25% by employer for all claims filed thereafter, award to claimant whose last exposure to pneumoconiosis occurred on January 3, 1973, should be assessed 75% against the Special Fund and 25% against the employer. KRS 342.316(13)(a).

Eugene Goss, Goss & Forester, Harlan, for Otis Maggard.

William A. Rice, Rice & Huff, Harlan, for International Harvester Co.

Robert D. Hawkins, Chief Counsel, Dept. of Labor, Frankfort, Gemma M. Harding, Dept. of Labor, Louisville, Arthur R. Samuel, John Oakley, Dept. of Labor, Frankfort, for James R. Yocom and Special Fund.

CATINNA, Commissioner.

Otis Maggard was last exposed to the hazards of pneumoconiosis on January 3, 1973, which date is also the date of his last employment. He had worked in the mines for a period of more than forty-years prior to his disability.

On April 2, 1973, the Workmen's Compensation Board found that Maggard was permanently and totally disabled by the occupational disease of pneumoconiosis. He was awarded compensation in the sum of $60 per week for a period of 425 weeks in the aggregate. Liability for the entire award was assessed against the Special Fund.

Maggard also filed a claim for benefits under the National Coal Mine Health and Safety Act of 1969, as amended, Title 30 U.S.C.A., Subchapter IV, Black Lung Benefits, Section 901, et seq. Although this federal claim was pending during the proceedings had before the Workmen's Compensation Board, no final action was taken prior to the time when the award of the board became final.

Maggard and the Special Fund, in separate appeals to the Harlan Circuit Court, contended that the board erroneously construed and applied the law as set out in the 1972 amendments to the Workmen's Compensation Act, particularly Section 37 of Senate Bill 184 (1972 Acts, Chapter 78, Section 37) relating to the effective date of certain provisions of the act as amended. The circuit court, in affirming the board, dismissed each appeal and from this judgment Maggard and the Special Fund appeal to this court.

Section 37 of Senate Bill 184 provides:

> "Effective date. This Act shall be effective on January 1, 1973; and effective for all claims filed on and after January 1, 1973; provided, however, that in the event federal law specifies that claims covered by provisions of this Act shall be filed with a federal agency such claims shall continue to be filed as required by the federal law until repeal or expiration of the federal law requiring same; then, in that event, the increase in benefits provided herein shall not apply to those claims where benefits are awarded under the federal law. The benefits under the present law KRS Chapter 342 shall apply to those claims."

This section lends itself to various constructions, thus forming the basis of the controversy in this proceeding. The Workmen's Compensation Board has construed this section as standing for the

proposition that for so long as there is a Federal Black Lung Program the effective date of the amendments in Senate Bill 184, insofar as they apply to increased black-lung benefits, are deferred and all proceedings under the Kentucky Workmen's Compensation Act are governed by the law in effect prior to the amendment. Consequently, the board has limited its awards to a maximum of $60 per week for a period of 425 weeks and assessed all payments against the Special Fund.

Upon this appeal Maggard poses the three following questions:

"QUESTION NO. 1

Where the 1972 Amendments to the Kentucky Workmen's Compensation Act, incorporated in *Senate Bill 184* of the *Acts of the General Assembly*, require payment of benefits in the sum of $81.00 per week for life to a workman successfully claiming total and permanent disability from occupational pneumoconiosis, when such workman's last exposure to the hazards of the occupational disease occurred on January 3, 1973.

"QUESTION NO. 2

Whether the 1972 Amendments to the Kentucky Workmen's Compensation Act incorporated in *Senate Bill 184* of the *Acts of the General Assembly* require payment of benefits in the sum of $63.00 per week for 425 weeks to a workman successfully claiming total and

permanent disability from occupational pneumoconiosis, where such workman's last exposure to the hazards of the occupational disease occurred on January 3, 1973, subject to increase to $81.00 per week for life should such workman's claim for Federal Black Lung Benefits be ultimately denied.

"QUESTION NO. 3

Whether the 1972 Amendments to the Kentucky Workmen's Compensation Act, incorporated in *Senate Bill 184* of the *Acts of the General Assembly*, require payment of benefits in the sum of $63.00 per week for 425 weeks to a workman successfully claiming total and permanent disability from occupational pneumoconiosis, where such workman's last exposure to the hazards of the occupational disease occurred on January 3, 1973."

In a separate proceeding Maggard seeks to recover the difference between the $60 per week awarded him by the board and the sum of $63 per week to which he claims to be entitled.

The Special Fund upon its appeal questions the act as follows:

> "1. Whether the 1972 Amendments to the Kentucky Workmen's Compensation Act, Incorporated Chapter 78, Section 37, of Senate Bill 184 of the Acts of the General Assembly delay the payments of increased benefits until January 1, 1974.

> "2. Whether the 1972 Amendments to the Workmen's Compensation Act, Incorporated Chapter 78, Section 18(13) (a), in Senate Bill 184 of the Acts of the General Assembly became effective January 1, 1973."

It is admitted by all of the parties that Section 37 is very ineptly drawn and fails to clearly express the desires or intentions of the legislature insofar as an increase in black-lung benefits is concerned. The separate appeals of Maggard and the Special Fund are illustrative of a conflict that defies resolution from a mere reading of the act. Because of this conflict, it becomes necessary for us to examine Senate Bill 184 amending the Workmen's Compensation Act and prevailing circumstances and seek to ascertain therefrom the intention and purpose of the legislature in so enacting this amendment and, in particular, Section 37.

In Princess Manufacturing Company v. Jarrell, Ky., 465 S.W.2d 45 (1971), we said:

> "* * * It is not the prerogative of the court to attempt to establish policy or determine the wisdom of the legislation. When we encounter a situation where the legislative intent is not discernible from the language of the act, we may look beyond the language of the act to legislative history and purpose of the legislation and other pertinent factors to determine legislative intent."

See also May v. Clay-Gentry-Graves Tobacco Warehouse Company, 284 Ky. 502, 145 S.W.2d 84 (1940).

A determination of the purposes of Senate Bill 184 requires that it be examined in light of certain provisions of the Federal Black Lung Act.

In the adoption of Subchapter IV, Black Lung Benefits, of the Coal Mine Health and Safety Act of 1969, the congressional findings and declaration of purpose were set out as follows:

> "Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the nation's underground coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease; and that few states provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to insure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis." (30 U.S.C.A. Section 901).

[1] The above section indicates that Congress intended to guarantee adequate benefits upon a

permanent basis and not merely during the effective period of the act.

Section 921 of the act provided for the promulgation of standards defining total disability and certain presumptions that were to be considered. Section 922 providing for the payment of benefits required that the amounts awarded be reduced on a monthly or other appropriate basis by an amount equal to any payment received under a state workmen's compensation act, the consequence being that the federal payments merely supplemented payments by the states, where made, to the point where Congress was of the opinion that the recipient was receiving adequate benefits.

Section 923(a) of the act provided that the federal authorities would accept claims for benefits under the act until December 31, 1972, while 923(c) provided that no claim for benefits under the act would be considered unless the claimant had also filed a claim under the state workmen's compensation law prior to or at the same time his claim was filed for benefits under the act.

What we might term the penalty provisions of the act are set out in Sections 931 and 932. Section 931(a) provides that on or after January 1, 1973, claims for benefits for total disability due to pneumoconiosis should be filed pursuant to the applicable state workmen's compensation law, except during such period when the state law does not

provide adequate coverage for pneumoconiosis. Section 931(b) defines adequate coverage of a state law as being, in effect, the same coverage provided by the federal act. The state law would be considered inadequate unless the Secretary of Health, Education and Welfare should have established its adequacy by publishing this fact in the Federal Register.

Section 932 provides that during any period after December 31, 1972, in which the state workmen's compensation law is not on the list published by the secretary all black-lung benefits accruing to coal miners or their dependents would be governed and paid pursuant to the provisions of the Federal Longshoremen's and Harbor Workers' Compensation Act. Section 932 of the act has the effect of abrogating a state workmen's compensation act when the Secretary of Health, Education and Welfare, or after December 31, 1972, the Secretary of Labor, found the state law and the benefits thereunder inadequate thereby forcing the mining industry to operate under a federal act.

This was the posture of the situation at the time Senate Bill 184 was enacted. The legislature was faced with the necessity of passing an act that complied with federal standards or of surrendering the administration and payment of pneumoconiosis benefits to the federal government under the Longshoremen's and Harbor Workers' Compensation Act.

An examination of Section 18 of Senate Bill 184 reveals that KRS 342.316 was extensively amended for the purpose of meeting the requirements and presumptions of the Federal Black Lung Act particularly those contained in Section 921. The senate bill also amended many other sections of the Kentucky Workmen's Compensation Act, including those providing a formula for determining the maximum benefits paid for total disability and the duration of all such payments.

At the time the Kentucky Legislature was in the process of enacting Senate Bill 184, an effort was being made in Congress to extend black-lung benefits under Subchapter IV for at least another year.

[2] The federal act then in effect expired December 31, 1972, and the penalty provisions of the federal act would therefore have become effective as to any state workmen's compensation act on January 1, 1973. The legislature was obviously seeking to comply with the federal requirements and in so doing to cause its actions to become effective not later than the date of the expiration of the federal act. As the legislature was aware that Congress was considering a further extension of the Federal Black Lung Act, it is apparent that it was not contemplated that those provisions of Senate Bill 184 relating to increased black-lung benefits should take effect until the federal act, as extended, had expired. Section 37 provided for the contingency

of the federal act's being extended to a date beyond January 1, 1973. We are of the opinion that Section 37, as adopted, contemplated that increased black-lung benefits, as provided for in Senate Bill 184, should not take effect until such time as the federal act, then in effect or as extended, had expired or been repealed. Although Section 37 does not specifically refer to the black-lung amendments of the Kentucky Workmen's Compensation Act, it identifies those sections of the amended act that are not to become effective as being those which at the time were governed by the federal act. Insofar as we are aware, the only duplication in the Kentucky Workmen's Compensation Act and the federal act was the provision of the Coal Mine Health and Safety Act of 1969 for the payment of black-lung benefits. Consequently, Section 37 had particular reference to black-lung benefits when it provided that increase of benefits, as set out in the act, did "not apply to those claims where benefits are awarded under the federal law."

Subsequent to the final passage of Senate Bill 184 and the adjournment of the legislature, Congress, on May 19, 1972, enacted the "Black Lung Benefits Act of 1972," thus extending the federal black-lung benefits for a period of one year—December 31, 1973. The federal act of 1972 contained all of the provisions of the original 1969 act with the exception that the words "underground coal mines" in the 1969 act were deleted and the

words "coal mines" inserted. The 1972 act contained identical provisions insofar as eligibility was concerned with the exception that the claim was required to be filed on or before December 31, 1973. Presumptions, definitions, and penalties of the 1969 act were all made a part of the 1972 act.

Considering the specific questions that the parties have encountered by reason of the asserted ambiguity in Section 37 of Senate Bill 184, we have concluded as follows: By the terminology contained in Section 37, all the amendments of the Workmen's Compensation Act embraced within Senate Bill 184 took effect on January 1, 1973, except those amendments which increased black-lung benefits, which increases were deferred for so long as there was an effective federal black-lung program.

It is contended that the legislature did not contemplate an extension of the federal program and, therefore, the extension does not fall within the meaning of Section 37. It should be noted that if this were true, then there would have been no need for any part of Section 37 subsequent to its first statement that the act should be effective on January 1, 1973. Reference is made to that portion of Section 37 which provides as follows:

> "* * * however, that in the event federal law specifies that claims covered by provisions of this Act shall be filed with a federal agency such claims shall continue to be filed as required

by the federal law until repeal or expiration of the federal law requiring same; then, in that event, the increase in benefits provided herein shall not apply to those claims where benefits are awarded under the federal law. The benefits under the present law KRS Chapter 342 shall apply to those claims."

[3] The next ambiguity asserted by the parties entails the latter part of Section 37 and is nothing more than a question of procedure. It is apparent that the legislature, in providing for an orderly implementation of all the amendments to the workmen's compensation law as set out in Senate Bill 184, intended that the "present law" (the 1970 act) should remain in effect in those instances where the effective date of an amendment had been deferred by the federal law. Thus, until such time as the Federal Black Lung Program was terminated, a black-lung claimant under the Kentucky Workmen's Compensation Act was bound to proceed under the 1970 act.

[4] The parties also are concerned with the question of whether an award made under the 1970 law could be reviewed and the amount thereof increased or modified upon a proper application after the Federal Black Lung Program has terminated. The present workmen's compensation law, as amended, makes no provision for a reopening upon such grounds. By no stretch of the imagination could any part of Section 37 be so construed as to permit the

reopening of awards made under the 1970 law subsequent to termination of the federal program. Such awards are final and are subject to review only upon the grounds provided by KRS 342.125.

It is seriously contended that should a federal black-lung claim be denied then the wording of Section 37 is such that the case should be reopened and the award increased to comply with the Kentucky act, as amended. This claim is based upon the wording in the section which reads: "* * * the increase in benefits provided herein shall not apply to those claims where benefits are awarded under the federal law." Maggard claims that there must be an award under the federal law if he is to be bound by an award of the Workmen's Compensation Board made prior to the amendment's becoming effective. However, when we construe the entire sentence, we can only conclude that the phraseology is such that the legislature was not speaking of an individual or an individual award but rather designating a class of people who would be eligible under the federal act. We do not believe the legislature was concerned with whether a claim was filed or an award made but only with the eligibility of the person under the federal act.

[5] One other phrase in Section 37 has caused some considerable confusion. After saying that the act shall be effective on January 1, 1973, the section provides: "* * * and effective for all claims filed on or after January 1, 1973; * * *." The question is

whether one last exposed to black lung in 1972 could file a claim in 1973 and thereby be entitled to the increased benefits afforded by the amendments. We do not consider this to be a proper interpretation, as we have held that the law in effect on the date of the injury or the date of the last exposure, as the case may be, is the law that fixes the rights of the claimant, and the filing date of the claim has no bearing upon the award other than whether there has been a compliance with the statute of limitations. KRS 342.316(5); Beth-Elkhorn Corporation v. Thomas, Ky., 404 S.W.2d 16 (1966).

[6] Maggard, in a separate appeal, seeks to recover the difference between $60 per week awarded by the board and $63 which he claims should have been awarded. As previously stated, the Workmen's Compensation Board, in its construction of Section 37 of Senate Bill 184, has refused to increase any awards made to black-lung claimants. It is true that Section 37 did provide that there would be no increase in benefits so long as there was a federal black lung program. Yet, in the next sentence the section provides: "The benefits under the present law KRS Chapter 342 shall apply to those claims."

KRS 342.095 of the then-present law provided:

> "The maximum basic weekly income benefit for total disability shall not exceed 55% of 85% of the average weekly wage of the state, computed as provided in KRS 342.143 * * * ."

KRS 342.143 provides for the termination of a state average weekly wage to be used in determining amounts due claimants under the Workmen's Compensation Act. This section provides in part that on or before September 1 of each year the state average weekly wage shall be determined by the method set out therein. The section then provides: "The average weekly wage as so determined shall be applicable for the full period during which income or death benefits are payable, when the date of occurrence of injury or of disablement in the case of disease, or of death, falls within the calendar year commencing January 1, following the September 1 determination." The required September 1 determination of the state weekly wage was duly made and certified on June 7, 1972, at which time it was fixed at $135.01. Thus, employing the computations provided by KRS 342.095, we determine $63 per week to be the maximum payable on claims where the injury or disability occurs within the calendar year commencing January 1, 1973. Maggard was disabled on January 3, 1973. Therefore, the maximum amount of his benefits should have been determined at $63 per week.

[7] The cross-appeal of the Special Fund is concerned primarily with Section 18(13)(a) of Senate Bill 184 (now KRS 342.316(13)(a)). Prior to the amendment by the senate bill, in those cases where it had not been conclusively proven that the claimant's disability had resulted from his last

exposure, all compensation was assessed against the Special Fund. The amendment as contained in Senate Bill 184 provided as follows:

> "In those cases where disability or death are not conclusively proven to be the result of such last exposure all compensation shall be paid out of the special fund for all claims filed prior to January 1, 1973; and 75 per cent shall be paid by the special fund and 25 per cent by the employer for all claims filed thereafter."

[8] We do not believe that the provisions of Section 37 in any way deferred the effective date of this particular section of Senate Bill 184. To require apportionment where the last exposure occurred prior to January 1, 1973, would violate Section 19 of our Constitution. Cf. General Refractories Company v. Henderson, 313 Ky. 613, 232 S.W.2d 846 (1950). However, where a claimant was last exposed after January 1, 1973, any award made by the Workmen's Compensation Board should be so allocated as to require the Special Fund to pay 75% of the award, while the remaining 25% should be assessed against the claimant's employer.

Maggard, in his brief, claims that because of the ambiguities of Section 37 there are six questions which ultimately must be answered by this court. Although we have answered them in the course of this opinion, for the sake of clarity and by way of

summary, we set out these questions together with our answers:

"(1) Do the 1972 Amendments, increasing benefits for permanent and total disability to $81.00 per week for life (KRS 342.730) apply to claims 'filed' on or after January 1, 1973, irrespective of the date of the last injurious exposure, or does this increase in benefits result only to workmen who had injurious exposure on or after January 1, 1973?"

The increased benefits apply only to those workmen whose last injurious exposure occurred on and after January 1, 1973. The maximum amount of $81 will be subject to adjustment on the basis of the state average weekly wage as determined by KRS 342.143.

"(2) Assuming that the increase in benefits only to workmen who were injuriously exposed during the calendar year 1973, without reference to the date of filing, is the increase in benefits provided by KRS 342.730 totally deferred until expiration of the Federal Black Lung Program, without reference to the outcome of any Federal Black Lung Claim which a miner might file?"

The increase provided by KRS 342.730 is totally deferred until expiration of the Federal Black Lung Program, and we are of the opinion that the outcome of a federal black-lung claim filed by a miner does not enter into the question of deferment.

"(3) Assuming that the increase in benefits results only to workmen who were injuriously exposed during the calendar year 1973, without reference to the date of filing, does the increase in benefits effected by KRS 342.730 result to those workmen whose Federal Black Lung Benefits are ultimately denied and, if so, by what mechanical or procedural process should such claims be handled?"

The date of the last injurious exposure determines the amount of compensation payable, KRS 342.316(5), and the act provides no procedure by which a claimant who has been denied federal black-lung benefits might have his claim reopened for further consideration.

"(4) Whether the increase in benefits is deferred at all."

As we construe Section 37, the increased benefits payable to black-lung claimants under the Kentucky Workmen's Compensation Act, as amended by Senate Bill 184, are deferred for such a period of time as there is in existence a federal black-lung program.

"(5) The extent of the employer's liability."

Upon claims filed subsequent to January 1, 1973, where the last injurious exposure occurred after January 1, 1973, the award shall be assessed 75% against the Special Fund and 25% against the employer.

"(6) Whether, in any event, the pre-1972 formula for determining total and permanent disability benefits, incorporated in KRS 342.095 (55% of 85% of the average weekly wage of the state as computed and provided in KRS 342.140), applied to the prevailing wage for the applicable year 1973 ($135.01 per week), is the appropriate formula for ascertaining weekly benefits payable to a workman whose last injurious exposure was in calendar 1973, resulting in minimum benefits of $63.00 per week for 425 weeks."

Section 37 of Senate Bill 184 does not in any way indicate that this formula as set out was not to be used in those cases where the injurious exposure occurred in 1973, even though an increase in black-lung benefits was deferred during such period as there was a federal black-lung program.

So much of the judgment as upholds the findings of the Workmen's Compensation Board to the effect that Otis Maggard was totally disabled as the result of pneumoconiosis is affirmed. The remaining portion of the judgment is hereby reversed with directions that a new judgement be entered remanding the case to the Workmen's Compensation Board for further action in conformity with this opinion.

OSBORNE, C. J., and JONES, MILLIKEN, PALMORE, REED and STEINFELD, JJ., sitting.

All concur.

"D(2)"

Fid CHAPMAN, Appellant,

v.

EASTERN COAL CORPORATION et al., Appellees.

Court of Appeals of Kentucky.

Feb. 7, 1975.

Coal miner, who quit work in the coal fields in March of 1973, filed claim for workmen's compensation benefits for occupational disease of coal worker's pneumoconiosis and/or silicosis. The Compensation Board found that claimant had become totally and permanently disabled as result of such disease and awarded him maximum compensation allowable under law as it existed prior to the 1972 amendments. The Pike Circuit Court, Reed D. Anderson, J., sustained board's action, and claimant appealed. The Court of Appeals, Palmore, J., held that purpose of the 1972 amendments, which increased benefits for occupational pneumoconiosis but which deferred effective date thereof until expiration of federal black lung program, was to bring Kentucky compensation law into substantial conformity with federal black lung law and that the amendments, by denying increase in monetary

benefits to black lung claimants whose claims arose during 1973 transition, did not work invidious discrimination in violation of the equal protection clause.

Judgment affirmed.

1. **Workmen's Compensation — 73**

Purpose and effect of 1972 amendment to Workmen's Compensation Act increasing benefits for occupational pneumoconiosis but delaying increased benefits until expiration of federal black lung program, were to bring Kentucky workmen's compensation law into substantial conformity with federal black lung law. Federal Coal Mine Health and Safety Act of 1969, §§ 2, 401 et seq., 414, 415 as amended 30 U.S.C.A. §§ 801, 901 et seq., 924, 925; Acts 1972, c. 78, § 37.

2. **Constitutional Law — 209**

Statutes — 71

A classification does not violate the principle of uniformity, or of equal protection of the laws if it has a rational basis or rational justification. U.S.C.A. Const. Amend. 14.

3. **Constitutional Law — 208(1)**

If the legislative objective is legitimate and the classification is rationally related to that objective, the classification is not constitutionally arbitrary. U.S.C.A. Const. Amend. 14.

4. **Constitutional Law — 209**

On a challenge to legislative enactment as violating equal protection guaranty, the court's prerogative does not extend beyond determining whether the legislative objective is a reasonable basis for the exercise of its power. U.S.C.A. Const. Amend. 14.

5. **Constitutional Law — 208(16)**

Workmen's Compensation — 26

The 1972 amendments, which increased benefits for occupational pneumoconiosis but which deferred effective date of increased benefits until expiration of federal black lung program, did not violate equal protection clause; denial of increased monetary benefits to black lung claimants whose claims arose during the 1973 transition period does not work an invidious discrimination as between them and coal miners (and other covered employees) disabled during the same period of time by causes different from black lung. Acts 1972, c. 78, § 37; U.S.C.A. Const. Amend. 14.

7. **Constitutional Law — 48(3)**

Any doubt as to constitutional validity of legislation must be resolved in favor of the legislative prerogative.

Kelsey E. Friend, C. Kilmer Combs, Pikeville, for appellant.

Baird & Baird, Pikeville, Earl Cornett, Frankfort, for appellees.

Cyril E. Shadowen, Asst. Counsel, Dept. of Labor, Louisville, for appellee James R. Yocum, Commissioner of Labor and Special Fund.

J. W. Craft, Jr., Craft, Barrett, Haynes & Ward, Hazard, amicus curiae, for Hazard Coal Operator's Association.

C. Gibson Downing, Bennett Clark, Stoll, Keenon & Park, Lexington, amicus curiae, for Kentucky Coal Association.

Harry C. Campbell, Lexington, for Big Sandy-Elkhorn Coal Operators' Association.

David L. Beckman, Louisville, for Assoicated Industries of Kentucky.

PALMORE, Justice.

Fid Chapman, a 58-year-old coal miner, quit working for Eastern Coal Corporation on March 19, 1973, and filed a claim for workmen's compensation of March 28, 1973. He had worked in the coal mines for some 16 years. On April 29, 1974, following the reception of evidence pro and con, the compensation board entered a finding to the effect that he had become totally and permanently disabled on March

19, 1973, as the result of "the occupational disease of coal workers' pneumoconiosis and/or silicosis" and awarded him compensation of $63 per week for 425 weeks plus reimbursement of medical expenses not exceeding $3500. This was the maximum compensation allowable for total permanent disability prior to the enactment of Chapter 78, Acts of 1972, hereinafter called the 1972 amendment.

On Chapman's appeal to the circuit court, in which he contended that he should have been awarded $81 per week for life plus unlimited medical expenses in accordance with the 1972 amendment, the action of the board was sustained by an order in which the court expressed misgivings with respect to the constitutionality of Sec. 37 of the 1972 amendment as it has been construed in Maggard v. International Harvester Company, Ky., 508 S.W.2d 777 (1974). In that case, however, no constitutional issue was presented or decided.

[1] The purpose and effect of the 1972 amendment were to bring our workmen's compensation law into substantial conformity with Subchapter IV of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §§ 801, 901 et seq., which subchapter in entitled, "Black Lung Benefits," and will be referred to here as the federal black lung law, or simply as the federal law. Most important among the changes in the state law was a very substantial increase in the amount and duration of benefits

payable to successful claimants, effective January 1, 1973, except as to those covered by the federal law.

Essentially, the federal law enabled black lung claimants who did not have commensurate advantages under state compensation laws to claim benefits from the federal government and at federal expense until the end of 1972. During 1972 Congress extended this period until the end of 1973, except that as to claims filed during the last half of 1973 liability for benefits payable after December 31, 1973, was shifted to the employers. 30 U.S.C.A. §§ 924, 925.

Maggard, supra, construed Sec. 37 of the 1972 amendment to mean that if a claimant was eligible under the federal law he could not recover the increase in monetary benefits effected by the 1972 amendment of the state law. In short, it was determined that the legislative intent was to exclude black lung claimants whose last exposure occurred in 1973 from the increase in manimum payments available by virtue of the 1972 amendment to other workmen who became disabled in 1973. The ostensible reason for the exclusion was that these particular claimants already were the beneficiaries of special dispensation by Congress and were, presumably, sufficiently provided for under the federal black lung law. An obvious effect was to leave any additional finanacial burden with respect to black lung claimants upon the taxpayers of the United States instead of shifting it to the coal

mining industry so long as Congress saw fit to make the public money available.

Maggard held also that the rights of a black lung claimant under our own statutes depend upon the date of the last injurious exposure vis-a-vis the time of filing his claim. Maggard v. International Harvester Company, Ky., 508 S.W.2d 777, 783 (1974). Though it may be different under the federal law, this conforms to the rule of statutory construction consistently followed in Kentucky when there is no indication of a legislative intent to the contrary.

The sole contention made now is that the denial of increased monetary benefits to black lung claimants whose claims arose during the 1973 transition period works an invidious discrimination as between them and coal miners (and other covered employes) disabled during the same period of time from causes different from black lung and thus violates the Equal Protection Clause of the 14th Amendment.

The last injurious exposure and disability of the appellant, Chapman, occurred in March of 1973. Theretofore, in 1971, he had applied for benefits under the federal black lung law but the claim had been denied because, he said, he was still working at

that time.[1] Whether at any time during the pendency of this proceeding Chapman had a federal claim in process does not appear from the record.[2]

The criteria of recovery by black lung claimants under the federal law do not appear to be significantly different from those provided by our compensation law. Thus a claimant entitled to maximum benefits under the state law should be eligible also for maximum benefits afforded by the federal law. There are, however, substantial differences in amount. This case presents a fair example. The appellant has been found totally and permanently disabled by the reason of pneumoconiosis resulting from his work in the coal mines. He has one dependent (his wife) and a life expectancy of 15.39 years. His rate of pay during employment ($20 per shift, 5 days per week) entitled him to the maximum amount of state compensation, which is $63 per week for 425 weeks and reimbursement of medical expenses not exceeding $3500. Assuming the fact-finding federal agency would reach the same

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1. Among other things, however, subject to certain exceptions the federal law provides that no claim for benefits shall be considered unless a claim has been filed under the state law or is filed simultaneously with the federal claim. There is no indication that Chapman had filed a claim under the state law when his 1971 federal claim was filed.

2. There is no reason to infer that the dismissal of his federal claim prematurely filed in 1971 would prejudice another federal claim if filed after the date of his last injurious exposure.

conclusion with respect to the cause and extent of his disability, he would be entitled to 75% of "the minimum monthly payment to which a Federal employee in grade GS—2, who is totally disabled, is entitled at the time of payment under chapter 81 of Title 5," but "reduced . . . by an amount equal to any payment received . . . under the workmen's compensation . . . laws of his State on account of the disability of such miner . . ." 30 U.S.C.A. § 922(a)(1) and (2), (b). According to Title 20, § 410.510(d) of the Social Security regulations, 39 FR 26632, this payment amounts of $254.70 per month through September of 1973 and $266.40 per month thereafter, and it continues for life, subject to fluctuation with the current salary schedules for federal employes. Since $266.40 per month is $61.48 per week and the appellant will draw $63 per week under state law, any recovery awarded him under the federal law would be completely offset for the first 425 weeks or until such earlier time as the federal salary schedule should be amended upward. Roughly speaking, then, as of the present time it appears that under the combined state and federal laws he can collect $63 per week for 425 weeks and $61.48 per week thereafter during his lifetime.

On the other hand, except for Sec. 37 of the 1972 amendment he would be entitled to draw $81 per week for life, plus unlimited medical expenses. Therefore, aside from medical expenses the disparity between what he should be able to draw under the

combined laws and what he could draw under the state laws were it not for the exclusion of his class of claimants is $18 per week for 425 weeks and $19.52 per week for the remainder of 15.39 years. Hence it is clearly apparent that the difference is substantial.

[2-5] It is conceded that a classification does not violate the principle of uniformity, or of equal protection of the laws, if it has a reasonable basis, or "rational justification." Cf. United States v. Kras, 409 U.S. 434, 446, 93 S.Ct. 631, 34 L.Ed.2d 626 (1973); Dandridge v. Williams, 397 U.S. 471, 485, 90 S.Ct 1153, 25 L.Ed.2d 491 (1970). If the objective is legitimate and the classification is rationally related to that objective, it is not constitutionally arbitrary. Cf. Richardson v. Belcher, 404 U.S. 78, 84, 92 S.Ct. 254, 30 L.Ed.2d 231 (1971). The goal here seems to have been to defer placing an economic burden upon the coal industry until it was no longer being carried on other shoulders. Though we do not defend it, our prerogative as a court does not extend beyond determining whether such an objective is a reasonable basis for the exercise of legislative power, and we cannot avoid the conclusion that it is. As we understand the constitutional protection against unreasonable discrimination, it is the reason for rather than the amount of the difference that is of primary importance.

"In 'the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' A legislature may address a problem 'one step at a time,' or even select one phase of one field and apply a remedy there, neglecting the others.' " Jefferson v. Hackney, 406 U.S. 535, 546, 92 S.Ct. 1724, 1731, 32 L.Ed.2d 285 (1972).

[6, 7] In the beginning (1916) our workmen's compensation act did not apply at all to occupational diseases as such. See background discussion in Jellico Coal Co. v. Adkins, 197 Ky. 684, 247 S.W. 972, 973-974 (1923). Disability or death from occupational silicosis was made compensable by Ch. 82, Acts of 1944, and the law was extended to occupational diseases in general by Ch. 77, Acts of 1956. Specifically excluded, however, were "ordinary diseases of life to which the general public is equally exposed outside of the employment . . . except where such diseases follow as an incident of an occupational disease." The word "pneumoconiosis" first appeared in § 3, Ch. 276, Acts of 1962, which added "any other compensable pneumoconiosis" to the provisions of KRS 342.316(4) and (6) relating to silicosis claims and used the same terminology in a new subsection (13) of the statute. In the same year this court recognized the term "pneumoconiosis" as descriptive of a compensable

disease (assuming, of course, supportive medical evidence with respect to causation). Gregory v. Peabody Coal Co., Ky., 355 S.W.2d 156 (1962); High Splint Coal Co. v. Chandler, Ky., 363 S.W.2d 103 (1962). Nevertheless, the claims of coal miners disabled from pulmonary conditions continued to stand at a disadvantage for the simple reason that many medical experts on the subject—probably a great majority—were of the opinion that non-silicotic "black lung" is not a disease and that the other symptoms or diseases usually manifested along with or as a part of the disabling condition, such as emphysema, are infirmities to which the general public is equally exposed. From the cases that have come before us over the years we have the distinct impression that the conservative and generally prevalent viewpoint in the medical profession has been that exposure to the dust of soft coal will not alone cause any debilitating disease.

Not until the enactment of Ch. 16, Acts of 1970, were the provisions of KRS 342.316 so broadened as to leave no doubt that "black lung" is covered. This act removed the qualification that ordinary diseases of life to which the general public is equally exposed shall not be compensable and amended KRS 342.316(6) to provide that in case of death or disability from silicosis, "coal worker's

pneumoconiosis," or any other compensable pneumoconiosis, "complicated with . . . pulmonary emphysema or other pulmonary dysfunction," if the claimant has had substantial employment exposure "to harmful dust or industrial hazards reasonably competent to produce such accompanying disease or dysfunction, there is a rebuttable legal presumption that all resultant disability therefrom is work related and compensable."

The preamble of the federal black lung law observed in 1969 that "few States provide benefits for death or disability due to this disease." 30 U.S.C. § 901. Thus it was Congress, a political body, which finally bridged the causal gap that medicine had been hesitant to cross, and in so doing provided federal benefits to which most other workmen, whether disabled by disease or by injury, were not and are not entitled. All this we point out only to illustrate that science, history, and politics all have combined to put black lung in a different class from other work-connected disabilities. It has traveled a road of its own. In the absence of Ch. 16, Acts of 1970, it would in most instances be compensable only under the federal law. Under the 1972 act it was unequivocally placed on an equal plane with other work-connected disabilities as of January 1, 1974. While we might be inclinded to

view the one-year deferment effected by Sec. 37 of the 1972 act as ill-advised or ill-drawn, and perhaps both, there can be little doubt of what it meant, and any doubt as to its constitutional validity must be resolved in favor of the legislative prerogative. Cf. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 Harv.L. Rev. 129, 148.

The judgment is affirmed.

All concur.

Rendered: May 9, 1975

COURT OF APPEALS OF KENTUCKY
74-1099

CECIL FUGATE — APPELLANT

APPEAL FROM HARLAN CIRCUIT COURT
V. HON. EDWARD G. HILL, JUDGE
CIVIL ACTION NO. 2110

UNITED STATES STEEL
CORPORATION, ET AL — APPELLEES

OPINION OF THE COURT BY JUSTICE JONES

AFFIRMING

On January 21, 1974, Cecil Fugate filed an application for adjustment of claim with the Workmen's Compensation Board. The claim alleged that Fugate became affected with the occupational disease of pneumoconiosis on January 11, 1974, when he was last exposed to the hazards of the occupational disease of pneumoconiosis. Fugate, at the time of the filing of the claim for benefits, was 61 years of age. It is undisputed that he had worked as an underground coal miner for approximately 37 years. In his claim Fugate contended that he was

entitled to $81.00[1] per week for life. Based upon medical reports, United States Steel and the Special Fund withdrew their notices of resistance. Subsequently, United States Steel and the Special Fund filed a motion to amend their withdrawals of resistance. It was their contention that the maximum compensation rate applicable to this claim was less than $81.00 per week and that the maximum duration of compensation was 425 weeks. They further contended that Fugate was not entitled to benefits for life under the state Workmen's Compensation Law. They insisted that Fugate was entitled to claim additional benefits under federal law.

The Workmen's Compensation Board awarded Fugate benefits under former KRS 342.095 at the rate of $65.00 per week for 425 weeks as required by the latest average prevailing wage. The board apportioned the award against the Special Fund at $48.75 per week and directed that United States Steel Company pay the additional amount of $16.25 per week.

Fugate filed a petition for review of the award in the Harlan Circuit Court. He alleged that the Workmen's Compensation Board erred in not awarding him benefits at the rate of $81.00 per week

1. According to the brief for the Special Fund, the correct amount should be $84 (60% of the average weekly wage of $139.49, per KRS 342.740) rather than $81 per week for a 1974 claim if it is not within the exception of Sec. 37, Ch. 78, Acts of 1972.

for life. On October 10, 1974, the circuit court affirmed the opinion and award of the board.

The precise issue presented in this appeal is whether Fugate is limited to an award of $65.00 per week for a period of 425 weeks, or is entitled to the increase benefits provided by Chapter 78, Acts of 1972, as construed in Maggard v. International Harvester Company, Ky., 508 SW 2d 777 (1974).

Section 37 of the 1972 Act provided as follows:

> "NOTE: Effective date. This act shall be effective on January 1, 1973; and effective for all claims filed on and after January 1, 1973; provided, however, that in the event federal law specifies that claims covered by provisions of this Act shall be filed with a federal agency such claims shall continue to be filed as required by the federal law until repeal or expiration of the federal law requiring same; then, in that event, the increase in benefits provided herein shall not apply to those claims where benefits are awarded under the federal law. The benefits under the present law KRS Chapter 342 shall apply to those claims."

In Chapman v. Eastern Coal Corporation, Ky., 519 SW 2d 390 (1975), it was decided that by virtue of the foregoing provision black lung claims for disability occurring before January 1, 1974, were excluded from the increase in amount of monetary benefits applicable to other disability claims under the 1972 Act. We observed in that opinion that an

obvious effort of this legislative exclusion was to leave any additional burden with respect to black lung claims on the taxpayers of the United States so long as Congress saw fit to make public money available, but that beginning in 1974 black lung was "unequivocally placed on an equal plane with other work-connected disabilities." 519 SW 2d at pp. 392,394. Our statement to the latter effect was based, however, upon the assumption that as of January 1, 1974, our compensation law as amended by the 1972 Act provided "adequate coverage for pneumoconiosis" within the meaning of the federal law, 30 U.S.C.A. § 931, and indeed it does so appear when the provisions of our law are compared with those of the federal law according to the substantive criteria set forth in 30 U.S.C.A. §931 (2).[2] Nevertheless, as of this writing the Secretary of

2. Under the federal law this particular claimant's benefits would amount to $43.25 per week, subject to adjustment according to current salary schedules for federal employees, whereas the maximum compensation under the 1972 Kentucky law for permanent total disability occurring in January of 1974 is $84 per week for life. On the other hand, though $84 per week is the maximum allowance under Kentucky law regardless of the number of dependents, federal benefits are augmented, during such time as the claimant has dependents, to the extent of 50% for one, 75% for two, and 100% for three dependents. 20 CFR § 725.510 (a). Another point of disparity between the federal and state laws is the liberal allowance of attorney fees by KRS 342.320. However, as of the present time the amount of benefits payable under our law ordinarily (that is, in cases involving less than three dependents) would so far exceed those payable under the federal law that the maximum attorney fee of $6500 could hardly spell the difference between adequate and inadequate coverage.

Labor has not yet listed *any state* as providing "adequate coverage for pneumoconiosis."[3] See 20 CFR 722.152. The result is that by virtue of 30 U.S.C. §931 et seq. black lung claims may be filed with and allowed by the United States Department of Labor under the Longshoremen's and Harbor Workers' Compensation Act, (hereafter called the Longshoremen's Act), 33 U.S.C. §901 et seq., and are payable by the employers or their insurers rather than the public treasury.

It is the contention of the Special Fund that the federal law still provides a remedy for black lung claimants and that the federal law has not been repealed nor has it expired.

The court is of the opinion that the position of the Special Fund is well taken.

Under the provisions of federal law all black lung claimants have a remedy for obtaining benefits. Kentucky has not been certified by the Secretary of Labor as being in compliance with federal requirements in providing benefits for black lung claimants. Under 30 U.S.C.A. Sec. 932(e), payment of benefits is to be continued through the United States Department of Labor for a period of twelve years after December 30, 1969.

3. The action of the Secretary of Labor in listing or failing to list a state can be subjected to review by a United States Circuit Court of Appeals. 30 U.S.C.A. §931 (2). Whether that avenue has been taken by any state thus far is not within our knowledge.

The Legislature, by Section 37 of Senate Bill 184, has deferred benefit increases to black lung claimants as long as there is a federal black lung program applicable to Kentucky miners. Such a federal program is now in existence.

Fugate insists that the purpose of Section 37 of Senate Bill 184 was to defer the increase of benefits until January 1, 1974. The language of Section 37 is clear and concise. If that had been the intent of the Legislature, it should have expressed that intent.

The enactment of Section 37 of Senate Bill 184 in 1972, and other amendments to KRS 342, like the opening of Pandora's box, released a multiplicity of ills relating to "black lung" benefits to coal miners affected with pneumoconiosis. Now, the only thing that remains is hope. If any changes are to be made in Kentucky workmen's compensation law to increase benefits or to shift the burden of payments that is the province and prerogative of the General Assembly.

The Kentucky Legislature has deferred black lung benefit increases to claimants as long as there is a federal black lung program applicable to Kentucky miners. A federal program does exist and is not slated to expire until 1981 or until this state is listed by the Secretary of Labor as providing adequate coverage for pneumoconiosis, whichever is the earlier.

The judgment is affirmed.

All concur.

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* * * * * * *

"E"

CHESTER SLONE

AGE 54 YEARS

DEPENDENT: WIFE

1. WORKMEN'S COMPENSATION BOARD AWARD (based on pre-1973 benefits).
   (a) 425 weeks at $63 per week — $26,775.00
   (b) Medical Benefits up to $3,500.00
   (c) Death Benefits for Dependents — Limited Duration
   $57 per week during dependency up to 400 weeks, less the number of weeks paid worker before death (approximate).

2. AWARD ON THE BASIS OF 1973 BENEFITS WITHOUT DISCRIMINATION.
   (a) $81 per week for life — Life expectancy — 18.09 years
   Number of weeks — 940.68
   940.68 weeks at $81 — $76,195.08
   (b) Medical Benefits — Unlimited
   (c) Death Benefits for Dependents — Unlimited Duration
   $81 per week during dependency

* * * * * * * *

ABLE CHAPMAN, JR.

AGE 41 YEARS

DEPENDENT: WIFE JUNE

1. WORKMEN'S COMPENSATION BOARD AWARD (based on pre-1973 benefits).
   (a) 425 weeks at $63 per week — $26,775.00
   (b) Medical Benefits up to $3,500.00
   (c) Death Benefits for Dependents — Limited Duration
   $57 per week dependency up to 400 weeks, less the number of weeks paid worker before death (approximate).

2. AWARD ON THE BASIS OF 1973 BENEFITS WITHOUT DISCRIMINATION.
   (a) $81 per week for life — Life expectancy — 27.45 years
   27.45 years = 1427.4 weeks
   1427.4 x $81 = $115,619.40
   (b) Medical Benefits — Unlimited
   (c) Death Benefits for Dependents — Unlimited Duration
   $81 per week during dependency

* * * * * * * *

PHILLIP ANDERSON

AGE 51 YEARS

DEPENDENTS: WIFE NELL AND SON PHILLIP

1. WORKMEN'S COMPENSATION BOARD AWARD (based on pre-1973 benefits).
   (a) 425 weeks at $63 per week — $26,775.00
   (b) Medical Benefits up to $3,500.00
   (c) Death Benefits for Dependents — Limited Duration
   $57 per week during dependency up to 400 weeks, less the number of weeks paid worker before death (approximate).

2. AWARD ON THE BASIS OF 1973 BENEFITS WITHOUT DISCRIMINATION.
   (a) $81 per week for life — Life expectancy — 20.20 years
   20.20 years = 1050.4 weeks
   1050.4 weeks at $81 per week = $85,082.40
   (b) Medical Benefits — Unlimited
   (c) Death Benefits for Dependents — Unlimited Duration
   $81 per week during dependency

* * * * * * * *

CLETIS KINNEY

AGE 43 YEARS

DEPENDENTS: WIFE MAXINE AND 4 INFANT CHILDREN

1. WORKMEN'S COMPENSATION BOARD AWARD (based on pre-1973 benefits).
   (a) 425 weeks at $63 per week — $26,775.00
   (b) Medical Benefits up to $3,500.00
   (c) Death Benefits for Dependents — Limited Duration
   $57 per week during dependency up to 400 weeks, less the number of weeks paid worker before death (approximate).

2. AWARD ON THE BASIS OF THE 1973 BENEFITS WITHOUT DISCRIMINATION.
   (a) $81 per week for life — Life expectancy — 26.00 years
   26 years = 1352 weeks
   1352 x $81 = $109,512.00
   (b) Medical Benefits — Unlimited
   (c) Death Benefits for Dependents — Unlimited Duration
   $81 per week during dependency

* * * * * * * *

October 25, 1974

BLACK LUNG PAYMENTS FROM 1970 (Increases in line with Federal pay raise)

	1970	1971	1972*	Jan/Sept Oct/Dec 1973	Jan/Sept Oct 1974 1974	Current
Miner or Widow	$144.50	$153.10	$161.50	$169.80	$177.60	$187.40
1 dependent	216.70	229.60	242.20	254.70	266.40	281.10
2 dependents	252.80	267.90	282.60	297.10	310.80	328.00
3 dependents	288.90	306.10	322.90	339.50	355.20	374.80

1972* Beneficiaries also received the retroactive raise for October/November/December 1972 in a lump sum check.

CERTIFICATE OF SERVICE

I, C. KILMER COMBS, attorney for appellants herein and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 20th day of June, 1975, I served copies of the foregoing Jurisdictional Statement on the several parties thereto, as follows:

1. On James R. Yocom, Commissioner of Labor of Kentucky and Custodian of the Special Fund, by depositing in a United States Post Office three copies in a duly addressed envelope with first class postage prepaid addressed to Cyril E. Shadowen, attorney for the Commissioner of Labor, Department of Labor, Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40202, his attorney of record.

2. On Deskins Branch Coal Company; on Kentucky-Elkhorn Coals, Inc.; and on Kentucky Carbon Corporation, individually and as representatives of the class of employers named as appellees in the caption above, by depositing in a United States Post Office three copies thereof in a duly addressed envelope with first class postage prepaid addressed to William J. Baird, Baird and Baird, attorneys, Post Office Box 351, Pikeville, Kentucky 41501, their attorneys of record.

3. On Shelby T. Denton, Chairman, Alfred A. Naff, George B. Simpson, Clyde Mullins, and Glen Schilling, Members comprising the Workmen's

Compensation Board of Kentucky, and Ed. W. Hancock, Attorney General of Kentucky, by depositing in a United States Post Office three copies thereof in a duly addressed envelope with first class postage prepaid addressed to Thomas R. Emerson, Assistant Attorney General, Capitol Building, Frankfort, Kentucky 40601, their attorney of record.

4. All parties required to be served have been served.

C. Kilmer Combs

C. KILMER COMBS
Attorney for Appellants

Supreme Court, U. S.
FILED
JUL 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 74-1623

CHESTER SLONE,
ET AL ..... APPELLANTS

VS:

DESKINS BRANCH COAL COMPANY,
ET AL ..... APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 74-1623

CHESTER SLONE,
ET AL ..... APPELLANTS

VS:

DESKINS BRANCH COAL COMPANY,
ET AL ..... APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

The appellees, Deskins Branch Coal Company, Kentucky Elkhorn Coals, Inc. and Kentucky Carbon Corporation, pursuant to Rule 16 (1) (C) of this Court, respectfully move that the judgment of the specially constituted Three Judge District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantiated as not to need further argument.

QUESTION PRESENTED

The statement of appellants (pp. 5-7) lists ten questions as presented on this appeal. As these appellees view the case, the question presented (which in fact incorporates the substance of the questions raised by appellants) is as follows:

I. **WHETHER THE DEFERRAL OF PAYMENT OF INCREASED STATE WORKMEN'S COMPENSATION BENEFITS TO COAL MINERS DISABLED BY PNEUMOCONIOSIS, WHO, AS A CLASS, ARE THE ONLY PERSONS ENTITLED TO FILE CLAIMS FOR ADDITIONAL OCCUPATIONAL DISEASE DISABILITY BENEFITS PROVIDED BY THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, AS AMENDED, IS A VIOLATION OF RIGHTS GUARANTEED BY THE EQUAL PROTECTION PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.**

STATEMENT

Section 37, Chapter 78, Acts of 1972, Kentucky General Assembly, the statute involved on this appeal, is set out verbatim in Appellants' Jurisdictional Statement at pages 4 and 5.

The judgment and per curiam opinion of the lower Court, upholding the constitutionality of the Act, appears at pages 1a through 8a of Appellants' Appendix.

The Opinion of the Court of Appeals of Kentucky in the case of *Chapman* v. *Eastern Coal*

Corporation, Ky., 519 S.W. 2d 390 (1975), in which the Kentucky Court upheld the constitutionality of this statute (against an attack that it violated the equal protection clause of the Fourteenth Amendment to the United States Constitution —) appears on pages 40a through 53a of Appellants' Appendix. (Chapman did not prosecute an appeal to this Court.)

The 1972 Kentucky Legislature (Senate Bill 184) extensively amended the Workmen's Compensation Law of Kentucky and, inter alia, provided for increased benefits for occupational diseases. (KRS 342.316, Section 4). The effective date of the Act was declared to be January 1, 1973. However, Section 37 (the section being challenged here) provided, in effect, that as to those claims for occupational diseases which could also be filed with a Federal Agency (Federal Black Lung Act), the benefits under such claims should be based on the old law in existence prior to the amendment.

ARGUMENT

The opinion of Justice Palmore in *Chapman* v. *Eastern Coal Corporation*, Ky., 519 S.W. 2d 390 (1975) (all Justices concurring) records the reasons for the 1972 Amendment as to occupational diseases. The Court, at pages 391-392, said:

"The purpose and effect of the 1972 amendment were to bring our workmen's compensation law into substantial conformity with Subchapter IV of 1969, 30 U.S.C. §§801, 901 et seq., which subchapter is entitled, "Black Lung Benefits," and will be referred to here as the federal black lung law, or simply as the federal law. Most important among the changes in the state law was a very substantial increase in the amount and duration of benefits payable to successful claimants, effective January 1, 1973, except as to those covered by the federal law.

Essentially, the federal law enabled black lung claimants who did not have commensurate advantages under state compensation laws to claim benefits from the federal government and at federal expense until the end of 1972. During 1972 Congress extended this period until the end of 1973, except that as to claims filed during the last half of 1973 liability for benefits payable after December 31, 1973 was shifted to the employers. 30 U.S.C.A. §924, 925. *Maggard*, supra, construed Sec. 37 of the 1972 Amendment to mean that if a claimant was eligible under the federal law he could not recover the increase in monetary benefits effected by the 1972 amendment of the state law. In short, it was determined that the legislative intent was to exclude black lung claimants whose last exposure occurred in 1973 from the increase in *mani* mum payments available by virtue of the 1972 amendment to other workmen who became disabled in 1973. The ostensible reason for the exclusion was that

these particular claimants already were the beneficiaries of special dispensation by Congress and were, presumably, sufficiently provided for under the federal black lung law. An obvious effect was to leave any additional financial burden with respect to black lung claimants upon the taxpayers of the United States instead of shifting it to the coal mining industry so long as Congress saw fit to make the public money available."

Since the Workmen's Compensation Act is economic legislation, the General Assembly may provide different classifications for differing treatment under the Act without violation of the equal protection clause of the Fourteenth Amendment so long as there is some rational basis for the different classifications *Dandridge* v. *Williams*, 397 U.S. 471, 485; 90 S.Ct. 1153; 25 L.Ed. 2d 491, 501 (1970). A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan* v. *Maryland*, 366 U.S. 420, 426, 6 L.Ed. 2d 393, 81 S.Ct. 1101 (1961). Those attacking must negate every conceivable basis which might support it. *Madden* v. *Kentucky*, 309 U.S. 83, 84 L.Ed. 590, 60 S.Ct. 406.

Mere classification does not of itself deprive a group of equal protection. *Carrington* v. *Rash*, 380 U.S. 89, 13 L.Ed. 2d 675, 85 S.Ct. 775. A state may classify persons for the purpose of legislation,

and, as here, the Kentucky Legislature has a wide range of discretion in exercising its power to make classifications for the purpose of enacting laws over matters within its jurisdiction. *Morey* v. *Doud*, 354 U.S. 457, 1 L.Ed. 2d 1485, 77 S.Ct. 1344; *Reed* v. *Reed*, 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed. 225; *Robinson* v. *Board of Regents of Eastern Kentucky University*, 6th Circuit Ky., 475 F. 2d 707 (1973).

When Section 37 is viewed and examined in relation to the above basic rules of construction, it would seem clear that it is not violative of the rights secured appellants under the Fourteenth Amendment. Appellants were members of a class of coal miners who were entitled to file for and receive Federal benefits, in addition to State benefits. All members of their class were treated equally. The Federal benefits were peculiar to their class, and not available to employees entitled to State benefits by reason of injuries or occupational diseases not related to coal mining. The Legislature obviously made the distinction because of the Federal benefits available to appellants and members of their class. This classification has a reasonable basis and is therefore not purely arbitrary. The wording of Section 37, being of an unusual character, strongly suggests that the Legislature gave careful consideration to determine whether it was obnoxious to the Constitution. *Morey* v. *Doud*, *supra*. Appellants have not met the burden of proof to overcome the presumption of constitutionality.

CONCLUSION

For the foregoing reasons the Court is respectfully submitted that this Court should grant the Motion of these appellees to affirm the judgment of the District Court without further argument.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. 74-1623

CHESTER SLONE, ET AL. ..... APPELLANTS
VS:
DESKINS BRANCH
COAL COMPANY, ET AL. ..... APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975
NO. 74-1623

CHESTER SLONE, ET AL. ..... APPELLANTS

VS:

DESKINS BRANCH
COAL COMPANY, ET AL. ..... APPELLEES

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF KENTUCKY

MOTION TO AFFIRM

MAY IT PLEASE THE COURT:

The appellees, Hon. Shelby T. Denton, Chairman, Alfred A. Naff, George B. Simpson, Clyde Mullins and Glenn Schilling, Members of and Comprising the Workmen's Compensation Board and the Workmen's Compensation Board of Kentucky, and Ed W. Hancock, Attorney General, Commnowealth of Kentucky, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final Order and Per Curiam Opinion of the United States District Court for the Eastern District of Kentucky be affirmed on the ground that the issues on which the deci-

sion of this case depends are so unsubstantial as not to warrant further argument.

STATEMENT OF THE QUESTIONS PRESENTED

I. **WHETHER THE QUESTIONS IN THE INSTANT CASE RAISE SUBSTANTIAL FEDERAL QUESTIONS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION SO AS TO WARRANT REVIEW BY THIS COURT?**

II. **WHETHER THAT SECTION OF THE KENTUCKY WORKMEN'S COMPENSATION ACT, TREATING ALL COAL MINERS COVERED BY THE FEDERAL BLACK LUNG ACT AND WHO APPLY FOR STATE WORKMEN'S COMPENSATION BENEFITS AFTER JANUARY 1, 1973, DIFFERENTLY FROM ALL OTHER PERSONS ENTITLED TO WORKMEN'S COMPENSATION BENEFITS UNDER KENTUCKY LAW, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?**

THE STATE STATUTES INVOLVED AND THE NATURE OF THE CASE

A. THE STATE STATUTES

This appeal involves the 1972 amendments to the Kentucky Workmen's Compensation Act (Kentucky Revised Statutes, Chapter 342), particularly Section 37 of Senate Bill 184 (1972 Acts, Chapter 78, Section 37), which provides as follows:

"Effective date. This Act shall be effective on

January 1, 1973; and effective for all claims filed on and after January 1, 1973; provided, however, that in the event federal law specifies that claims covered by provisions of this Act shall be filed with a federal agency such claims shall continue to be held as required by the federal law until repeal or expiration of the federal law requiring same; then, in that event, the increase in benefits provided herein shall not apply to those claims where benefits are awarded under the federal law. The benefits under the present law KRS Chapter 342 shall apply to those claims. (1972, c. 78, § 37; effective date clause, not compiled.)"

The particular section quoted immediately above has been discussed and interpreted by the Kentucky Court of Appeals in three recent decisions: *Maggard* v. *International Harvester Company*, Ky., 508 S.W. 2d 777 (1974); *Chapman* v. *Eastern Coal Corporation*, Ky., 519 S.W. 2d 390 (1975); and *Fugate* v. *United States Steel Corporation*, Ky., _____ S.W. 2d _____ (decided May 9, 1975. These decisions also appear at pages 16A through 60A of Appellants' Appendix (D).

B. THE PROCEEDINGS BELOW

The Order and Per Curiam Opinion of the United States District Court for the Eastern District of Kentucky entered March 31, 1975, dismissing appellants' action and holding that the Kentucky Workmen's Compensation Act as amended (1972 Acts, Chapter 78, Section 37) does not violate the Equal Protection

Clause of the Fourteenth Amendment to the United States Constitution is not reported. A copy of the Order and Per Curiam Opinion is found at pages 1A through 8A of Appellants' Appendix (A).

The appellants, Chester Slone, Abel Chapman, Jr., Phillip Anderson and Cledis Kinney are Kentucky coal miners, allegedly last exposed to the occupational hazards of coal workers pneumoconiosis (Black Lung) and disabled in 1973. They sought injunctive and declaratory relief under the authority of Federal law against the Kentucky Workmen's Compensation Board's procedure (pursuant to the Kentucky Revised Statutes) whereby Kentucky Workmen's Compensation Benefits payable to coal miners with coal workers pneumoconiosis are not increased in 1973, as they are for other persons entitled to state compensation benefits, when those coal miners are eligible for benefits under Federal law.

Pursuant to appellants' motion a three-judge court was convened. That court entered an order on November 27, 1974 abstaining from a consideration of this case until the Kentucky Court of Appeals first considered the allegation that the Kentucky Workmen's Compensation Act violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. See *Chapman* v. *Eastern Coal Corporation*, Ky., 519 S.W. 2d 390 (1975)

Subsequent to the decision of the Kentucky Court of Appeals in *Chapman*, supra, upholding the constitutionality of the section of the Kentucky Workmen's

Compensation Act challenged by appellants, the three-judge court entered its Order and Per Curiam Opinion dismissing appellants' action. The three-judge court concluded in part that the section of the Kentucky Workmen's Compensation Act complained of is constitutional and that there is a rational relationship between Kentucky's statutory scheme and the legitimate state interest which it was intended to serve.

ARGUMENT

I. THE ISSUES IN THE INSTANT CASE DO NOT RAISE SUBSTANTIAL FEDERAL QUESTIONS UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION SO AS TO WARRANT REVIEW BY THIS COURT.

This Court has on innumerable occasions through the years been confronted with appeals alleging that a substantial federal question under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution is being presented. An examination of the pertinent standards and principles and their application to the specific state statutory provision complained of in this case will demonstrate that substantial federal questions are not involved here. Review by this Court is, therefore, not warranted.

Before considering the provision of the Kentucky Workmen's Compensation Act challenged by appellants, it may be helpful to consider prior decisions of this Court and other Federal Courts involving the con-

cept and application of Equal Protection under the Fourteenth Amendment to the United States Constitution. At the outset it should be noted that in determining the validity, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, of a state statute the proper standard of judicial review is the traditional standard, requiring that the state system be shown to bear some rational relationship to a legitimate state purpose, rather than the strict judicial scrutiny standard, requiring the showing of a compelling state interest.

In *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973) this Court in determining the validity, under the Equal Protection Clause of the Fourteenth Amendment, of a state statute for financing public education, applied the traditional standard as education is not among the rights afforded explicit protection under the Federal Constitution. It was stated in *Frontiero* v. *Richardson,* 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (1973), that under the "traditional" equal protection analysis a legislative classification must be sustained unless it is patently arbitrary and bears no rational relationship to a legitimate government interest. Classifications based upon sex, race, alienage and natural origin are subjected to close judicial scrutiny.

This Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. A classification must be reasonable, not ar-

bitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation in order that all persons similarly circumstanced shall be treated alike. See *Reed* v. *Reed,* 404 U.S. 71, 76, 30 L. Ed. 2d 225, 229, 92 S. Ct. 251 (1971) and *U.S. Dept. of Agriculture* v. *Moreno,* 413 U.S. 528, 37 L. Ed. 2d 782, 93 S. Ct. 2821 (1973).

While it has been said that the prohibition of the Equal Protection Clause goes no further than invidious discrimination no precise formula has been developed in this area. In *Williamson* v. *Lee Optical of Oklahoma,* 348 U.S. 483, 489, 99, L. Ed. 563, 573, 75 S. Ct. 461 (1955) it was said:

> "The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think."

The case of *McGowan* v. *Maryland,* 366 U.S. 420, 425-426, 6 L. Ed. 2d 393, 399, 81 S. Ct. 1101 (1961) discussed in part the lack of a precise definition concerning the permissible scope of state legislation:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures

> are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."

In *McDonald* v. *Bd. of Election Com. of Chicago,* 394 U.S. 802, 22 L. Ed. 2d 739, 89 S. Ct. 1404 (1969), this Court said that state legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them. The test is not whether one class of individuals is treated differently from others but whether the difference in treatment is an invidious discrimination, *Lehnhausen* v. *Lake Shore Auto Parts Co.,* 410 U.S. 356, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973).

While there do not appear to have been many cases before this Court in the area of Equal Protection as applied to Workmen's Compensation Acts, this Court has considered many Equal Protection arguments in the field of economic and social welfare. In *West Coast Hotel Company* v. *Parrish,* 300 U.S. 379, 81 L. Ed 703 (1937), this Court said, in regard to a state minimum wage statute, that even if the wisdom of the statute is regarded as debatable and if its effects are uncertain such matters are for the legislature and not the courts. Furthermore, legislative regulation is not discriminatory because it is not extended to all cases which it might possibly reach. The legislature may confine its restrictions to

those classes of cases where the need is deemed to be greatest and legislation need not be crouched in all embracing terms.

This Court in *Dandridge* v. *Williams,* 397 U.S. 471, 485, 25 L. Ed. 2d 491, 501, 90 S. Ct. 1153 (1970), dealt with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments.

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' "

In *Jefferson* v. *Hackney,* 406 U.S. 535, 546, 32 L. Ed. 2d 285, 296, 92 S. Ct. 1724 (1972), it was stated:

> "A legislature may address a problem 'one step at a time,' or even 'select one phase of one field and apply a remedy there, neglecting the others.' Williamson v. Lee Optical Co. 348 U. S. 483, 489, 99 L. Ed. 563, 573, 75 S. Ct. 461 (1955). So long as its judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor and needy are not subject to a constitutional straitjacket. The very complexity of the problems

suggests that there will be more than one constitutionally permissible method of solving them."

The Equal Protection Clause does not require a state administered Unemployment Compensation Disability Fund to finance payments of benefits to those women whose disability is attributable to normal pregnancy and delivery (The program had excluded those disabilities from coverage but covered disabilities from abnormal pregnancies). The state has a legitimate interest in maintaining the self-supporting nature of its program and need not sacrifice that aspect to increase benefits or extent of coverage. As long as the line drawn by the State is rationally supportable, the courts will not interpose their judgment as to the appropriate stopping point. A state is not required to choose between attacking every aspect of a problem or not attacking the problem at all. *Geduldig* v. *Aiello,* 417 U.S. 484, 41 L. Ed. 2d 256, 94 S. Ct. ——— (1974).

Thus, in dealing with social or economic legislation or areas where fundamental rights are not involved a greater latitude is afforded legislative classification and a statutory classification will not be set aside if a rational basis exists to sustain it. *United States* v. *Craven,* 478 F. 2d 1329 (6th Cir. 1973). Every minor difference in the application of laws to different groups does not constitute a constitutional violation. Whether a violation exists depends upon the facts and circumstances behind the law, the interest which the state claims to be protecting and the interests of those disadvantaged by the classification. *Salyer Land Company* v. *Tulare Water*

District, 410 U.S. 719, 35 L. Ed. 2d 659, 93 S. Ct 1224 (1973).

The Courts have also held that there is no need for one program to duplicate the needs of another program. An individual whose social security disability benefits were reduced pursuant to the Social Security Act, providing for the reduction of such benefits to any person also receiving workmen's compensation benefits, was not subject to arbitrary discrimination as between disabled employes who receive Workmen's Compensation and those who receive compensation benefits from private insurance or from tort claim awards. Two unlike classes cannot be made indistinguishable by attaching to them a common label. See *Richardson* v. *Belcher,* 404 U.S. 78, 30 L. Ed. 2d 231, 92 S. Ct. 254 (1971) and *Lofty* v. *Richardson,* 440 F. 2d 1144 (6th Cir. 1971).

Several of the cases cited by appellants, including *Weber* v. *Aetna Casualty & Surety Company,* 406 U.S. 164, 31 L. Ed. 2d 768, 92 S. Ct. 1400 (1972); *New Jersey Welfare Rights Organization* v. *Cahill,* 411 U.S. 619, 36 L. Ed. 2d 543, 93 S. Ct. 1700 (1973); and *Jimenez* v. *Weinberger,* 417 U.S. 628, 41 L. Ed. 2d 363, 94 S. Ct. ——— (1974), involve the rights of illegitimate children. Under these cases workmen's compensation acts, the Social Security Act and state welfare programs cannot deny benefits, available to legitimate children, to illegitimate children solely because of their illegitimacy. These cases are not similar to that of the appellant coal miners who as a group have rights under both state and federal laws.

The issues raised by appellants in the instant case do not raise substantial federal questions under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution so as to warrant review by this Court.

II. THAT SECTION OF THE KENTUCKY WORKMEN'S COMPENSATION ACT, TREATING ALL COAL MINERS COVERED BY THE FEDERAL BLACK LUNG ACT, AND WHO APPLY FOR STATE WORKMEN'S COMPENSATION BENEFITS AFTER JANUARY 1, 1973, DIFFERENTLY FROM ALL OTHER PERSONS ENTITLED TO WORKMEN'S COMPENSATION BENEFITS UNDER KENTUCKY LAW, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION SO AS TO WARRANT REVIEW BY THIS COURT.

An application of the pertinent standards and principles to the specific Kentucky statute involved reveals that the Kentucky and lower federal court decisions correctly concluded that the Kentucky legislative scheme is constitutional and not in violation of the Equal Protection concept embodied in the United States Constitution. The specific section of the State act complained of by appellants (Section 37 of Senate Bill 184, 1972 Acts, Chapter 78, Section 37, set forth previously by these appellees) has been discussed and interpreted in several recent opinions of the Kentucky Court of Appeals and these decisions may be of assistance to this Court in resolving the questions presented.

In *Maggard* v. *International Harvester Company,*

Ky., 508 S.W. 2d 777 (1974), the Court of Appeals of Kentucky construed the section of the Kentucky Act involved herein to mean that if a claimant was eligible to file for benefits under the Federal Black Lung Law he could not recover the increase in monetary benefits provided by the 1972 amendments to the State Act. The legislative intent was to exclude black lung claimants, whose last exposure to the hazards of the occupational disease occurred in 1973, from the increase in payments available to other workers who became injured or disabled in 1973. Black lung claimants already are the beneficiaries of special legislation enacted by the Congress of the United States and one effect of the state law was to leave any additional financial burden with respect to black lung claimants upon the taxpayers of the United States instead of the coal industry so long as Congress saw fit to make public money available.

In *Chapman* v. *Eastern Coal Corporation,* Ky., 519 S.W. 2d 390 (1975), it was contended that the denial of increased monetary benefits to black lung claimants whose claims arose during 1973 works an invidious discrimination and thus violates the Equal Protection Clause of the Fourteenth Amendment as between them and other covered employes disabled during the same period of time from causes other than black lung. The Court of Appeals, in discussing the constitutionality of the classification scheme and recognizing that there are financial differences because of the classification, said in part at page 393 of its opinion:

". . . The goal here seems to have been to defer placing an economic burden upon the coal industry until it was no longer being carried on other shoulders. Though we do not defend it, our prerogative as a court does not extend beyond determining whether such an objective is a reasonable basis for the exercise of legislative power, and we cannot avoid the conclusion that it is. *As we understand the constitutional protection against unreasonable discrimination, it is the reason for rather than the amount of the difference that is of primary importance. . . .*" (Emphasis added).

As the Court of Appeals pointed out in *Chapman,* supra, at page 394 of its opinion, it was the United States Congress, a political body, which finally bridged the casual gap that medicine had been hesitant to cross and provided federal benefits for black lung which most other workmen in most other states, whether disabled by disease or by injury, were not and are not entitled. See 30 U.S.C.A. §901 et seq. Science, history and politics all have combined to put black lung in a different class from other work-connected disabilities and it has traveled a road of its own.

The Federal Black Lung provisions as amended provide in part that any claim for benefits due to pneumoconiosis shall be filed pursuant to the applicable State workmen's compensation law except that benefits are payable under the Federal provisions when applicants are not covered by state law. A State workmen's compensation law shall be deemed not to provide adequate coverage for pneumoconiosis unless it is included in the list of State laws found by the Secretary of Labor to provide adequate

coverage. See 30 U.S.C.A. §§ 931-932. As noted in *Fugate* v. *United States Steel Corporation,* Ky., _____ S.W. 2d _____, (decided May 9, 1975 and found at Appellants' Appendix 54A-60A) the Secretary of Labor has not yet listed any state as providing adequate coverage for pneumoconiosis.

The Federal Government has singled out coal miners with pneumoconiosis or Black Lung for special treatment. Kentucky coal miners who allegedly have pneumoconiosis or Black Lung have a remedy for obtaining Federal benefits. The State has denied benefit increases to State Black Lung claimants as long as the Federal program applicable to Kentucky coal miners remains in effect. All Kentucky coal miners alleging the presence of the disease of pneumoconiosis or Black Lung are treated equally.

While admittedly in some instances Kentucky coal miners would receive smaller benefits under the Federal program than under the State Workmen's Compensation Act, such fact by itself does not mean that the Kentucky provisions are unconstitutional. In some instances Federal benefits are higher, particularly, when the number of dependents is greater. Furthermore, the amount of weekly State benefits is determined by the year in which the person became injured or diseased and remains fixed while Federal benefits are keyed to a percentage of the salary schedule of Federal employes in grade GS-2 and will undoubtedly increase over the years. As previously stated, however, the reason for rather than the amount of the difference is of primary importance.

Kentucky coal miners with the occupational disease of pneumoconiosis or Black Lung do not receive the increased state workmen's compensation benefits afforded other state workers but that is because of the existence of the Federal program for occupationally diseased miners. The Federal Government has singled out this group of coal miners for special attention and Kentucky has treated all members of this classification equally under its statutes although differently from other state workers.

State Workmen's Compensation Acts seldom treat all workers equally but as long as the members of each classification are treated equally no discrimination exists. Kentucky, for example, excludes domestic servants and agricultural workers from coverage. See KRS 342.650 "Exemptions."

Thus, treating all coal miners with pneumoconiosis or Black Lung differently from other workers is not discriminatory in view of the federal program existing only for this specific group of coal miners. The Kentucky General Assembly, in dealing with the specific problem of coal miners affected with pneumoconiosis or Black Lung, has not discriminated against them, in violation of the Equal Protection Clause of the Fourteenth Amendment. There is a rational relationship between the state purpose being served and the Kentucky classification created in achieving that purpose.

CONCLUSION

These appellees submit that the questions upon which this cause depends do not raise substantial Federal questions under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and are so unsubstantial as not to require any further argument. These appellees move the Court to affirm the Judgment of the three-judge court of the United States District Court for the Eastern District of Kentucky.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Carl T. Miller, Jr., one of counsel for appellees, Shelby T. Denton, Chairman, Alfred A. Naff, George B. Simpson, Clyde Mullins and Glenn Schilling, Members of and Comprising the Workmen's Compensation Board and the Workmen's Compensation Board of Kentucky, and Ed W. Hancock, Attorney General, Commonwealth of Kentucky, hereby certify that copies of the foregoing Motion to Affirm were on the _____ day of July, 1975 served on the several parties as follows:

1. On the appellants by depositing in the United States mail three copies in a duly addressed envelope with first class postage prepaid addressed to Hon. C. Kilmer Combs, Attorney at Law, Post Office Box 112, Pikeville, Kentucky 41501.

2. On the appellees, Deskins Branch Coal Company; Kentucky-Elkhorn Coals, Inc.; and on Kentucky Carbon Corporation by depositing in the United States mail three copies in a duly addressed envelope with first class postage prepaid addressed to Hon. William J. Baird, Attorney at Law, Baird and Baird, Post Office Box 351, Pikeville, Kentucky 41501.

3. On James R. Yocom, Commissioner of Labor of Kentucky and Custodian of the Special Fund, by depositing in the United States mail three copies in a duly addressed envelope with first class postage prepaid addressed to Hon. Cyril E. Shadowen, Attorney for the Commissioner of Labor and Special Fund, 310 Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40202.

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Supreme Court, U. S.
FILED
JUL 21 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1623

CHESTER SLONE, ET AL. ..... APPELLANTS

VS:

DESKINS BRANCH COAL COMPANY, ET AL. ..... APPELLEES

ON APPEAL FROM THE SPECIALLY CONSTITUTED THREE JUDGE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1623

CHESTER SLONE, ET AL. ..... APPELLANTS

VS:

DESKINS BRANCH COAL
COMPANY, ET AL. ..... APPELLEES

ON APPEAL FROM THE SPECIALLY CONSTITUTED
THREE JUDGE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

MOTION TO DISMISS OR AFFIRM

MAY IT PLEASE THE COURT:

Appellees move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Specially Constituted Three Judge United States District Court for the Eastern District of Kentucky on the ground that it is manifest that the issues on which the decision of the case depends do not present a substantial federal question.

STATEMENT OF THE QUESTION PRESENTED

IS THE DEFFERAL OF PAYMENT OF INCREASED STATE WORKMEN'S COMPENSATION BENEFITS TO COAL MINERS DISABLED BY PNEUMOCONIOSIS, WHO, AS A CLASS, ARE THE ONLY PERSONS ENTITLED TO FILE CLAIMS FOR ADDITIONAL OCCUPATIONAL DISEASE DISABILITY BENEFITS PROVIDED BY THE FEDERAL COAL MINE HEALTH AND SAFETY ACT OF 1969, AS AMENDED, A VIOLATION OF RIGHTS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

STATEMENT OF THE CASE

This case is an appeal from the Judgment of the specially constituted Three Judge United States District Court for the Eastern District of Kentucky dismissing appellants action for declaratory and injunctive relief. The issue presented is whether there is a denial of equal protection under the fourteenth amendment to the United States Constitution to coal miners in Kentucky applying for state workmen's compensation benefits because of the occupational disease of pneumoconiosis popularly called "black lung." In 1972 the Kentucky General Assembly raised the level of compensation benefits for those persons covered by the provisions of the workmen's compensation act excepting only those persons covered by the Federal Black Lung Act who apply for benefits after January 1, 1973. The applicable statute is set out in the appendix herein, p. 2a.

In the consolidated cases of *Otis Maggard* v. *Inter-*

National Harvester Company, et al., Ky. 508 S.W.2d 777, (Feb. 1, 1974 as modified on Denial of Rehearing April 12, 1974) the Kentucky Court of Appeals rendered an opinion as to the construction and application of the 1972 amendments to the Kentucky Workmen's Compensation law. One issue in that case concerned the amount of compensation to be received by coal miners who became totally disabled subsequent to January 1, 1973 from the occupational disease of coal worker's pneumoconiosis, commonly called "black lung." The Court held that the 1972 amendments which increased workmen's compensation benefits so as to provide $81.00 per week for life to workmen's compensation claimants suffering permanent total disability was deferred as to that class of claimants suffering from pneumoconiosis stating as follows at page 785:

> "As we construe Section 37, the increased benefits payable to black-lung claimants under the Kentucky Workmen's Compensation Act, as amended by Senate Bill 184, are deferred for such a period of time as there is in existence a federal black-lung program."

The appellant herein, Chester Slone and others, allege that the interpretations of the law made by the Kentucky Court of Appeals in the Maggard case contravenes the United States Constitution and is violative of the equal protection clause of the Fourteenth Amendment because only coal miners suffering from the occupational disease of "black lung" were denied increased benefits under the 1972 amendments by the Kentucky General Assembly.

ARGUMENT

THE ISSUE RAISED IN THE INSTANT CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION UNDER THE EQUAL PROTECTION CLAUSE IN THE FOURTEENTH AMENDMENT.

A. THE LEGISLATURE HAS BROAD POWERS TO CLASSIFY PERSONS ELIGIBLE FOR WORKMEN'S COMPENSATION BENEFITS. THE SUB-CLASSIFICATION IN THE INSTANT CASE OF COAL MINERS ELIGIBLE FOR FEDERAL BLACK LUNG BENEFITS IS VALID.

Compensation Acts are not ordinarily applicable to all employments. Some are applicable only to certain occupations of a hazardous character. See 58 Am. Juris. Workmen's Compensation Sec. 81, page 635. Many states, as is true in Kentucky, exempt domestic servants and persons employed in agriculture. See KRS 342.650 in the appendix, p. 1a. Many states impose a requirement that there be a minimum number of persons working for a single employer before there is coverage. Therefore, it is abundantly clear that some employees, such as agricultural workers, are discrminated against because they receive no compensation benefits from work connected accidents and diseases. The United States Supreme Court in the case of *New York Central Railroad Co.* v. *White,* 243 U.S. 188, 61 L.Ed 667, 37 S.Ct. 247 (1917) as to the exclusion of farm laborers and domestic servants from the scheme of the New York statute at page 677 of 61 L. Ed. stated:

> "Manifestly, this cannot be judically declared to be an arbitrary classification, since it reasonably may be

> considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar."

In *Middleton* v. *Texas Power & L. Co.,* 249 U.S. 152, 63 L.Ed. 527, 39 S.Ct. 227 (1919), the Court upheld the exclusion of gin laborers on the same reasoning as applied to farm laborers.

In *Ward & Gow* v. *Krinsky,* 259 U.S. 503, 66 L.Ed. 1033, 42 S.Ct. 529 (1922), 28 ALR 1207, the Court stated at page 1041 of 66 L.Ed. as follows:

> "——There is a strong presumption that a legislature understands and correctly appreciates the needs of its own people: that its laws are directed to problems made manifest by experience; and that its discriminations are based upon adequate grounds." Citing *Middleton* v. *Texas Power & L. Co.,* supra.

The Court in the case of *McGowan* v. *State of Maryland* 366 US 420, 81 S. Ct. 1101; 6 L. Ed. 2d 393 (1961) stated at page 399 of 6 L. Ed. 2d:

> "_____ State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequalty. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.——"

Mr. Justice Potter Stewart, speaking for the Supreme Court majority in *Dandridge* v *Williams,* 397 U.S. 471, 90 S. Ct. 153, 25 L. Ed. 2d 491 (1970) at page 501 of 25 L. Ed. 2d stated as follows:

> "In the area of economics and social welfare, a State

does not violate the Equal Protection clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L. Ed. 369, 31 S. Ct. 337 'The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be and unscientific.'*Metropolis Theatre Co.* v. *City of Chicago,* 228 U.S. 61, 69-70, 57, L.Ed. 730, 734, 33 S. Ct. 441. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' *McGowan* v. *Maryland,* 366 U.S. 420, 426, 1105, 6 L Ed. 2d 393, 399, 81 S. Ct. 1101.

In the case of *Ross* v. *Moffitt,* . . . U.S. . . . , 94 S. Ct. 2437 (June 17, 1974) at page 2444 of 94 S. Ct. the Court stated:

> "Despite the tendency of all rights 'to declare themselves absolute to their logical extreme,' there are obviously limits beyond which the equal protection analysis may not be pressed without doing violence to principles recognized in other decisions of this Court. The Fourteenth Amendment 'does not require absolute equality or precisely equal advantages,' *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1, 24, 93 S Ct. 1278, 1291, 36 L. Ed. 2d 16 (1973), nor does it require the State to 'equalize economic conditions.' *Griffin* v. *Illinois,* supra, 351

> U.S. at 23, 76 S. Ct. at 592 (Frankfurter, J., concurring). It does require that the state appellant system be 'free of unreasonable distinctions,' *Rinaldi* v. Yaeger, 384 U.S. 305, 310, 86, S. Ct. 1497, 1500, 16 L. Ed. 2d 577 (1966) . . ."

There are several court decisions sustaining legislation which put the coal mining industry in a separate class as to State Workmen's Compensation Laws In the case of *Johnston* v. *Kennecott Copper Corp.,* (1918) 160 C.C.A. 417, 248 Fed. 407 (affirming 1916) 5 Alaska 571, the Court upheld the constitutionality, as against the objection of class legislation, of the Alaska Workmen's Compensation Law, which in terms applied only to mining concerns employing five or more persons. The Court noted that mining is the one great industry of Alaska.

In the case of *Lower Vein Coal Co.* v. *Industrial Board,* (1921) 255 U.S. 144, 65 L. Ed. 555, 41 Sup. Ct. Rep. 252 this Court sustained the Constitutionality of the Indiana Workmen's Compensation law where the law was compulsory as to the coal mining industry but elective as to other occupations.

See also, *American Coal Co.* v. *Allegany County* (1916) 128 Md. 564, 98 Atl. 143 (1916) applying only to those engaged in mining coal and clay in two counties which the court ruled to be constitutional.

In the case of *Scott* v. *Nashville Bridge Co.* 143 Tenn. 86, 223 S.W. 844 Tenn. (1920) the Court sustained the constitutionality of the Workmen's Compensation Law that exempted coal operators and their employees.

Larson at vol. 2 Sec. 65.40 notes an instance where

an occupational disease statute permits an award for silicosis only when it has reached the stage of total disability, and that an employee suffering from partially-disabling silicosis cannot sue at common law citing a New York case, *Del Busto* v. *E. I. Dupont DeNemours & Co.,* 167 Misc. 920, 5 N.Y.S. 2d 174 (1938) aff'd 259 App. Div. 1070, 21 N.Y.S. 2d 417, appeal denied, 284 N.Y. 817, 29 N.E. 2d 975. In that case the Supreme Court of Niagara County in 5 N.Y.S. 2d 174 held that the compensation act did not violate the fourteenth amendment to the Constitution of the United States nor Section 6 of Article 1 of the Constitution of the State of New York.

The questions before the Court were first, whether or not the legislature took away from the plaintiff his common law right of damages for partial disability: and second, if such right of action was taken away, was it done without providing another or different remedy, and thus in violation of the Constitution of the United States and of the State of New York.

In discussing the intent of the legislature to leave to plaintiff the right to sue at common law for partial disability the court stated at 5 N.Y.S. 2d page 176 that it was:

> "____ of the opinion that after further study of the burden of the disease upon industry, the legislature decided that the employer should bear the effect of total disability and that the employee should bear the burden arising from partial disability.

In a per curiam opinion, the Supreme Court, Appellant Division, Fourth Department 259 App. Div. 1070, 21 N.Y.S. 2d 417 affirmed the lower court, appeal denied 29 N.E. 2d 975.

Thus it is to be noted that the courts have consistently held that the mining industry and its workers can be treated as a separate class under state workmen's compensation laws and have also held that workers' suffering from silicosis can be put in a special classification for compensation purposes.

This Court should take judicial notice of the fact during the current energy crisis that Kentucky for some years has been the leading coal producing state in the nation. Because of this fact and because of the peculair working conditions of the coal industry and because the occupational disease of pneumoconiosis is developed only after many years of exposure and because of the multitude of compensation claims being filed thereunder during the years 1972 when the law in question was enacted, it is manifest that very special conditions existed which would justify a special classification by the Kentucky legislature in regard to coal miners.

See also the case of *Geduldig* v. *Aiello,* 41 L. Ed. 2d 256, 94 S. Ct. _____ (1974) for one of the most recent United States Supreme Court cases on the subject of the Equal Protection Clause. In that case the state of California had a disability insurance program for private employees temporarily disabled from working by an injury or illness not covered by workmen's compensation. It was financed by an assessment of one percent of the employee's salary. The California program insured against abnormal pregnancies but normal pregnancies were excluded. The law's constitutionality was challenged by a

woman having a normal pregnancy. This Court held that a state is not required by the Equal Protection Clause to sacrifice the self supporting nature of the program, reduce the benefits payable for covered disabilities, or increase the maximum employee contribution rate just to provide protection against another risk of disability, such as normal pregnancy The Court declared that the equal protection clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.

It is interesting to note that California under the pregnancy classification had two sub-classes: Normal pregnancies and abnormal pregnancies. One was compensable, the other non compensable. In Kentucky, coal miners suffering from injuries have a different classification than coal miners suffering from black lung. This is not an invidious classification in view of the legislatures attempt to unify the joint state-federal program. Congress itself had first created the separate classification for coal miners suffering from black lung when it passed the Federal Coal Mine Health and Safety Act of 1969.

B. THE UNITED STATES CONGRESS HAS FOUND THAT THE PECULIAR CIRCUMSTANCE AND CONDITIONS OF COAL MINERS JUSTIFY SPECIAL TREATMENT REGARDING COMPENSATION FOR PNEUMOCONIOSIS.

The Congressional findings and declaration of purpose in reference to Black Lung Benefits are set out in Section 901 of Title 30 of U.S. Code Annotated and the

1972 amendments thereto. Their purpose was to insure that coal miners and their dependants got adequate benefits under the federal law, in cooperation with the States, for death or disabilities due to pneumoconiosis.

Section 931 of the federal act as amended in 1972, provides as follows:

> "(a) On and after January 1, 1974, any claim for benefits for death or total disability due to pneumoconiosis shall be filed pursuant to the applicable state workmen's compensation law, except that during any period when miners or their surviving widows, children, parents, brothers, or sisters, as the case may be, are not covered by a State workmen's Compensation law which provides adequate coverage for pneumoconiosis they shall be entitled to claim benefits under this part.

The provisions of sub section "b," then make provisions for the Secretary to publish in the federal register a listing of those states providing adequate coverage and sets forth certain criteria that is to be used by the Secretary as guidelines in making his determination.

Section 932 (a) as amended in 1972, provides that during any period after December 31, 1973, that the individual coal operators, in states not in compliance as to adequate coverage are subject to the provisions of Public Law 803, 69th Congress (44 Stat. 1424 approved March 4, 1927) as amended. [The Longshoresmen Act].

Section 932 (g) provides that any benefits payable to disabled miners under the provisions of the Longshoresmen Act shall be reduced by the amount of any compensation received under a State workmen's compensation law because of death or disability due to pneumoconiosis.

Section 933 requires coal operators to qualify through insurance companies or as self-insurers to meet all black lung compensation claims in states that are not in compliance with the federal requirements. Neither Kentucky nor any other state has met those requirements.

Section 902 (c) as amended in 1972, gives jurisdiction to the Secretary of Labor after January 1, 1974, in reference to administering the federal black lung program, part C.

C. GREAT WEIGHT SHOULD BE GIVEN TO THE RULING BY THE KENTUCKY COURT OF APPEALS THAT THE LAW IN QUESTION IS CONSTITUTIONAL.

The same counsel prosecuting the present appeal of the class action suit filed in the United States District Court for the Eastern District of Kentucky represented a Kentucky coal miner who claimed a violation of his rights under the fourteenth amendment to the United States Constitution in the case of *Fid Chapman* v. *Eastern Coal Corporation,* Ky., 519 S.W. 2d 390 (Feb. 7, 1975). No Petition for a Writ of Certiorari was filed in that case and the decision of the Kentucky Court of

Appeals holding the law constitutional has become final. The Kentucky Court of Appeals in that case traced the legislative and medical history of compensation to coal miners for occupational diseases and noted as follows at page 394:

> ". . . all this we point out only to illustrate that science, history and politics all have combined to put black lung in a different class from other work connected disabilities . . ."

CONCLUSION

It is clear that the Kentucky legislature could deny benefits altogether for coal miners for pneumoconiosis or black lung. If this is so it would seem that such benefits could be frozen at present levels. In the area of economic and social welfare the states have very broad powers and the constitution is not offended simply because there is some inequality of benefits. The Kentucky Court of Appeals has found that medical science, history and politics have all combined to put black lung in a different class from other work connected disabili-

ties. The law being settled on this issue, there is no substantial federal question and the judgment herein should be affirmed.

Respectfully submitted,

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Attorneys for Appellees
Hon. James R. Yocom,
Commissioner of Labor,
Commonwealth of Kentucky
and Custodian of the Special Fund,
and Special Fund

CERTIFICATE OF SERVICE

I, Cyril E. Shadowen, one of counsel for appellees, Hon. James R, Yocom, Commissioner of Labor, Commonwealth of Kentucky and Custodian of the Special Fund, Special Fund, do hereby certify that on the 17th day of July, 1975, I served copies of the foregoing Motion to Dismiss or Affirm on the parties hereto as follows:

1. On appellants Chester Slone, Abel Chapman, Jr., Phillip Anderson, Cledis Kinney by depositing three copies each of same, postage prepaid, addressed to counsel for appellants C. Kilmer Combs, P. O. Box 112, Pikeville, Kentucky 41501

2. On Deskins Branch Coal Company, Kimper Kentucky; on Kentucky-Elkhorn Coals, Inc., McDowell, Kentucky; and on Kentucky Carbon Corporation, Phelps, Kentucky by depositing three copies each of same, postage prepaid, addressed to their counsel, Hon. William J. Baird, Baird & Baird, P. O. Box 351, Pikeville, Kentucky 41501.

3. On Shelby T. Denton, Chairman, Alfred A. Naff, George B. Simpson, Clyde Mullins, and Glen Schilling, Members comprising the Workmen's Compensation Board of Kentucky, and Ed W. Hancock, Attorney General of Kentucky, by depositing in a United States Post Office three copies thereof in a duly addressed envelope with first class postage prepaid addressed to Thomas R. Emerson, Assistant Attorney

General, Capitol Building, Frankfort, Kentucky 40601, their attorney of record.

4. All parties required to be served have been served.

Cyril E. Shadowen

CYRIL E. SHADOWEN
Attorney for Appellees
Hon. James R. Yocom,
Commissioner of Labor,
Commonwealth of Kentucky
and Custodian of the Special Fund
and Special Fund

APPENDIX

APPENDIX

Applicable Kentucky revised statutes as amended in 1972.

342.650 Exemptions. The following employes are exempt from the coverage of this chapter:

(1) Any person employed as a domestic servant in a private home by an employer who has less than two employes each regularly employed 40 or more hours a week in such employment.

(2) Any person employed, for not exceeding 20 consecutive work days, to do maintenance, repair, remodelling, or similar work in or about the private home of the employer, or if the employer has no other employes subject to this chapter, in or about the premises where such employer carries on his trade, business or profession.

(3) Any person performing services in return for aid or sustenance only, received from any religious or charitable organization.

(4) Any person for whom a rule of liability for injury or death is provided by the laws of the United States, except those persons covered under Title IV, Public Law 91-173, 91st Congress, commonly referred to as the Black Lung Benefits of the Federal Coal Mine Health and Safety Act of 1969, or as amended.

(5) Any person employed in agriculture.

(6) Any person who would otherwise be cov-

ered but who elects not to be covered in accordance with the rules and regulations promulgated by the Board. (1972, c. 78, § 5).

*"NOTE: Effective date. This Act shall be effective on January 1, 1973; and effective for all claims filed on and after January 1, 1973; provided, however, that in the event federal law specifies that claims covered by provisions of this Act shall be filed with a federal agency such claims shall continue to be held as required by the federal law until repeal or expiration of the federal law requiring same; then, in that event, the increase in benefits provided herein shall not apply to those claims where benefits are awarded under the federal law. The benefits under the present law KRS Chapter 342 shall apply to those claims. (1972, c. 78, § 37; effective date clause, not compiled.)

*The applicable law to the central issue in this case deffering increased benefits was not given an official section number by the statute compiler.

No. 74-1623

Supreme Court, U.S.
FILED
NOV 3 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHESTER SLONE, ET AL., APPELLANTS

v.

DESKINS BRANCH COAL CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1623

CHESTER SLONE, ET AL., APPELLANTS

v.

DESKINS BRANCH COAL CO., ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The United States submits this memorandum as *amicus curiae* in response to this Court's invitation of October 6, 1975.

1. Prior to 1972, Kentucky's Workmen's Compensation Act provided that a totally disabled worker would be entitled to benefits that could not exceed $63 per week for 425 weeks, and reasonable medical expenses of not more than $3,500. In 1972 the Act was amended; the maximum payment now is $81 per week for life and unlimited necessary medical expenses for any employee injured after January 1, 1973. However, workers eligible for federal compensation programs are not eligible for the higher schedule of benefits. The effect of this exception is that a

claimant eligible for black lung benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 792 *et seq.* (30 U.S.C. (1970 ed. and Supp. III) 901 *et seq.*) is ineligible under state law for the higher schedule of benefits. *Maggard* v. *International Harvester Co.*, 508 S.W.2d 777 (Ky. Ct. App.). Appellants contend that this ineligibility for higher state benefits, caused by their eligibility for federal benefits, denies them the equal protection of the laws.

A three-judge court was convened but abstained from consideration of the issue pending a state court determination of the constitutionality of the state statute. On February 7, 1975, the Kentucky Court of Appeals upheld the constitutionality of the critical section of the 1972 amendments. *Chapman* v. *Eastern Coal Corp.*, 519 S.W.2d 390. The three-judge district court then upheld the state statute, holding that there is "a rational relationship between this statutory scheme and the legitimate state interest which it was intended to serve" (J.S. App. 7a).

2. The decision below presents no substantial federal question. The difference in treatment under the state law arises because Congress has chosen to address black lung disease differently than other occupational diseases. The State has concurred in Congress' judgment.[1] There can be

[1]The difference in treatment will be advantageous to some claimants and disadvantageous to others. Although minimum federal benefits are less than Kentucky's higher benefit schedules, federal payments are increased if a claimant has dependents. 30 U.S.C. (Supp. III) 922(a)(3). The maximum federal payment now is $374.80 per month, or $23.80 more than the maximum payment under the higher schedules of the Kentucky program. The federal benefits, moreover, are increased to match increases in the cost of living; state benefits are not. Finally, a disabled Kentucky claimant is eligible for at least the lower schedule of state benefits whether or not federal benefits are provided; these state benefits are offset against any federal benefits the claimant may be awarded. 30 U.S.C. (Supp. III) 922(b).

no reasonable doubt about the constitutionality of the State's scheme; a State need not address all social ills in an identical fashion. As this Court held in *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489:

> Evils in the same field may be of different dimensions and proportions requiring different remedies. Or so the legislature may think. * * * Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. * * * The legislature may select one phase of one field and apply a remedy there, neglecting the others.

In the instant case the State's decision to treat miners suffering from black lung disease and eligible for federal benefits differently than other disabled workers not so eligible is clearly a matter within the discretion of the legislature. See, *e.g.*, *Weinberger* v. *Salfi*, No. 74-214, decided June 26, 1975; *Jefferson* v. *Hackney*, 406 U.S. 535; *McGowan* v. *Maryland*, 366 U.S. 420; *Lower Vien Coal Co.* v. *Industrial Board*, 255 U.S. 144.

Although the federal government would prefer that Kentucky provide greater benefits to black lung victims—Congress has sought to induce such action by the States[2] — Kentucky's failure to do so does not raise any constitutional question. Since the federal government has chosen to act broadly in this field, the State is entitled to defer to the federal program. This approach is rationally supportable

[2]See 30 U.S.C. (Supp. III) 901, 922(b), 931.

and therefore does not violate the Equal Protection Clause.[3] Appellants' policy arguments to the contrary must be addressed to the Kentucky legislature rather than to the courts. *Jefferson* v. *Hackney*, 406 U.S. 535.

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1975.

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[3]The Court need not defer disposition of this case pending its decision in *Dunlop* v. *Turner Elkhorn Mining Co.*, No. 74-1302, probable jurisdiction noted June 9, 1975, and *Turner Elkhorn Mining Co.* v. *Dunlop*, No. 74-1316, probable jurisdiction noted June 9, 1975. *Turner Elkhorn* involves the constitutionality of the federal black lung benefits program. The state program is constitutional whether or not the federal program is constitutional. If the federal program is upheld, the argument in the text of this memorandum demonstrates the constitutionality of the state program. If the federal program should be invalidated, then appellants would be eligible for the higher benefit schedules under state law, and their equal protection argument would be moot. Cf. *Fugate* v. *United States Steel Corp.*, Ky. Ct. App., No. 74-1099, decided May 9, 1975 (claimants will be eligible for higher state benefits once federal program expires); *Wagoner* v. *Swiney*, Ky. Ct. App., No. 75-396, decided October 17, 1975.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 74-1623

CHESTER SLONE, ET AL ..... APPELLANTS

VS:

DESKINS BRANCH COAL
COMPANY, ET AL ..... APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF KENTUCKY

APPELLANTS REPLY MEMORANDUM TO THE BRIEF OF THE SOLICITOR GENERAL

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APPELLANTS REPLY MEMORANDUM TO THE BRIEF OF THE SOLICITOR GENERAL

MAY IT PLEASE THE COURT:

Appellants respectfully respond to the Memorandum of the Solicitor General by pointing out:

1. The Solicitor General suggests that coal miner's "Black Lung" is different from all other occupational diseases. He would imply that it is not the same disease as pneumoconiosis in other industries. Appellants charge otherwise (J. S., p. 9), and the Congress

agrees.[1] The Secretary of Health, Education and Welfare defines "Black Lung" or "pneumoconiosis" as including silcosis arising from coal mining, a form of pneumoconiosis equally common to sandblasters, quarry workers, road construction workers, brick kiln workers and the like. Federal Register, Vol. 37, No. 191, Part III, §410.110, p. 20635, September 30, 1972. Clearly the term "Black Lung" embraces any pneumoconiosis arising only from coal mining.

2. Appellants charge that pneumoconiosis arising from coal mining is but one form of the same disease identified by occupation. We were prepared to establish by medical evidence that all pneumoconioses in the disabling stage create the same pulmonary dysfunction (retard the intake of oxygen and explusion of carbon dioxide), cause the same physical problems (shortness of breath on exertion, fatigue, chest pain, cough, etc.) and result in the same occupational disability. The problems are the same depending on degree of pulmonary dysfunction regardless of the source of the pneumoconiosis. Appellants were precluded from so establishing when the Court below *sua sponte* dismissed without an opportunity for an evidentiary hearing.

3. The Kentucky Workmen's Compensation Act embraces all forms of disabling pneumoconisosis arising out of employment. (J. S., p. 17, 18) Discrimination against coal miners with pneumoconiosis only on an occupational basis alone is a denial of equal protection *under state law.*

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1. 30 USC § 902 (b) — "The term 'pneumoconiosis' means a chronic dust disease of the lung arising out of employment in a coal mine."

4. The occupational discrimination is pointed up by the recent decision of the Kentucky Court in *Wagoner* v. *Johnson,* No. 75-402 (decided October 17, 1975). There, Johnson worked as a coal miner but his last thirteen (13) years were in the road construction industry. He became disabled as a construction worker on February 5, 1973, from pneumoconiosis. The Floyd Circuit Court held Johnson entitled to the increased benefits of a construction worker. The Kentucky Court of Appeals reversed and held that since the pneumoconiosis developed over his "whole work experience" including his coal mining, he would be relegated to the lesser benefits of a coal miner. Opinions of the Courts are included by appendix.

5. The Solicitor General suggests that Kentucky is merely deferring to the Congress. We disagree because:

(a) The Congressional enactment was a welfare measure, payable out of the public treasury for 1973 claims. It is not ". . . to be considered a workmen's compensation law or plan . . ." 30 USC §922 (b).

(b) The Kentucky Act is a true workmen's compensation plan, designed to compensate for wage loss. KRS 342.620 (9). It is payable solely by the employers and their insurance carriers, not from the public treasury (J. S. p. 11).

(c) The federal act provides only for "total disability", no partial disability payments were authorized. 30 USC §921 (a).

(d) There were no federal benefits for partial disability to defer to. Yet Kentucky denied the increase only to partially disabled coal miners with

pneumoconiosis, granting the increase to all others partially disabled. The coal miner receives his percentage of partial permanent disability on the lesser weekly sum for 400 weeks instead of life. The brick worker, construction worker or other worker with pneumoconiosis receives his percentage of partial permanent disability on the increased benefits for life, with provision for his widow and children.

6. The Solicitor General would suggest decisions such as *Weinberger* v. *Salfi*, No. 74-214, where widows of less than nine (9) months tenure were excluded from Social Security benefits. We suggest the result would have been different if *only widows of coal miners* had received *lesser benefits.*

7. The Solicitor General does not assert the "noncontractual" argument so often asserted in Social Security cases such as *Weinberger* v. *Wiesenfeld*, 419 U. S. 822, decided March 19, 1975. Even so, we suggest that the occupational discrimination here is not far removed from the sexual discrimination there condemned.

8. Unlike *Weinberger* v. *Wiesenfeld*, Supra, the state workmen's compensation benefits in Kentucky are contractual in nature. They stem directly from employment, for the disability must arise therefrom. The quid pro quo for the payment by the employer is the work performed by the workman and his relinquishing his right to sue under the Kentucky Constitution. The "contract" is that the parties will operate under the Kentucky Workmen's Compensation Act rather than the tort law of the Commonwealth. *General Refractories Co.* v. *Henderson*, 313 Ky. 613, 232 S. W. 2d 846, 848 (1950), a brick workers

pneumoconiosis (silicosis) case; *Simmons* v. *Clark Construction Co.*, Ky., 426 S. W. 2d 930, 932 (1968).

9. We suggest that *eligibility to apply* for federal black lung benefits cannot be equated with an *actual award* (J. S., p. 24). We note this Court's decision in *Philbrook* v. *Gladgett*, 421 U. S. 707, decided June 9, 1975. The Kentucky Court's position would have been far more palatable if it had so construed the Kentucky statute involved (quoted, J. S., p. 4, 5). Unfortunately this Court is bound by the Kentucky Court's construction. *Mullaney* v. *Wilbur*, No. 74-13, decided June 9, 1975.

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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APPENDIX

FLOYD CIRCUIT COURT

ACTION #10856

GEORGE JOHNSON VS: GREER BROTHERS & YOUNG CONSTRUCTION ET AL.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

* * *

1. The Findings of Fact of the Workmen's Compensation Board are adopted, except for the finding no. 3 that plaintiff was employed as a coal miner at the time he became disabled on or about February 5, 1973.

2. The undisputed testimony at the hearing discloses that the plaintiff has not worked in the coal mines since 1960. Since that time, he worked in the construction industry, drilling into and blasting rock. He continued that work right up to the date of his disability, February 5, 1973, the date of his last injurious exposure. (Transcript of Hearing, pages 4-8)

3. The undisputed evidence is that plaintiff's injurious exposure to silica dust for at least nine (9) years next preceding his disability was in road construction work, and not in the coal mines. His rate of compensation must be based upon disability from construction work, where he received his last injurious exposure.

CONCLUSIONS OF LAW

1. The rights of an occupational disease claimant under Kentucky statute depend upon the date of the last injurious exposure. *Maggard* v. *International*

Harvester Co., Ky., 508 S. W. 2d 777 (1974); *Chapman* v. *Eastern Coal Corporation,* Ky., ____ S.W.2d ____ (rendered February 7, 1975).

2. Plaintiff's last injurious exposure occurred as an employee of the defendant-employer, a construction worker and not a coal miner. Hence, plaintiff is entitled to receive the rate of compensation provided for construction workers and is not limited by *Maggard* and *Chapman* to the rate of compensation awarded by the Board.

3. The Court of Appeals made this clear in *Chapman,* where the Court said, "In short it was determined that the legislative intent was to exclude Black Lung claimants whose last exposure occurred in 1973 from the increase in maximum payments available by virtue of the 1972 Amendment to other workmen who became disabled in 1973." The Court made this even more clear in *Chapman,* when it said: "The goal seems to have been to defer placing an economic burden on the coal industry until it was no longer being carried on other shoulders."

4. In the instant case, plaintiff's last exposure in 1973 was not in the coal mines. Therefore, he was not within the class of workers excluded from increased benefits, that is, coal miners who were last injuriously exposed to coal dust in 1973.

5. The Workmen's Compensation Board clearly erred in not awarding plaintiff the increase in Workmen's Compensation Benefits provided by the 1972 Legislature, and the Opinion and Award will be set aside and the case remanded for entry of an Opinion and Award granting the increased benefits.

JUDGMENT

It is the judgment of this Court that the Opinion and Award rendered November 18, 1974, be and the same is hereby vacated and set aside, and this cause is remanded to the Workmen's Compensation Board with directions to enter an Award in favor of the plaintiff awarding him $81.00 per week commencing February 5, 1973, together with interest at the rate of six percent (6%) per annum on all past due and unpaid installments of such compensation, so long as plaintiff shall remain totally and permanently disabled, subject to a credit for all compensation heretofore paid, to be appropriately apportioned between the employer and the Special Fund; together with all reasonable medical expenses of plaintiff resulting from his disability.

After the time for appeal has expired, the Clerk of this Court is directed to return the record to the Workmen's Compensation Board for appropriate proceedings consistent with this Judgment.

Plaintiff shall recover his costs.

This 28 day of February, 1975.

/s/ Hollie Conley
JUDGE, FLOYD CIRCUIT COURT

* * * * * * *

RENDERED: October 17, 1975

COURT OF APPEALS OF KENTUCKY

No. 75-402

GEORGE R. WAGONER, ET AL. VS: GEORGE JOHNSON, ET AL.

Appeal From Floyd Circuit Court
Honorable Hollie Conley, Judge
Civil Action No. 10895

MEMORANDUM OPINION PER CURIAM

REVERSING

The issue presented is whether a claimant for workmen's compensation benefits for permanent total disability as a result of the disease of pneumoconiosis, whose last injurious exposure was on or subsequent to January 1, 1973, and whose condition was brought about by reason of his whole work experience rather than from any one particular period of employment, is entitled to the benefits as provided by Senate Bill 184, enacted by the 1972 General Assembly.

We have examined the record and are of the opinion that the issue presented herein falls within the rule established by Maggard v. International Harvester Company, Ky., 508 S.W.2d 777; Chapman v. Eastern Coal Corporation, Ky., 519 S.W.2d 390; and Fugate v. United States Steel Corporation, Ky., ____ S.W.2d ____ (rendered May 9, 1975). We are not persuaded to depart from the criteria set forth therein.

The judgment is reversed with directions that a new judgment be entered upholding the award of the board.

* * * * * * *

CERTIFICATE OF SERVICE

I, C. KILMER COMBS, attorney for appellants herein and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 10 day of November, 1975, I served copies of the foregoing Appellants Reply Memorandum to the Brief of the Solicitor General on the several parties thereto, as follows:

1. On James R. Yocom, Commissioner of Labor of Kentucky and Custodian of the Special Fund, by depositing in a United States Post Office three copies in a duly addressed envelope with first class postage prepaid addressed to Cyril E. Shadowen, attorney for the Commissioner of Labor, Department of Labor, Legal Arts Building, 200 South Seventh Street, Louisville, Kentucky 40202, his attorney of record.

2. On Deskins Branch Coal Company; on Kentucky-Elkhorn Coals, Inc.; and on Kentucky Carbon Corporation, individually and as representatives of the class of employers named as appellees in the caption above, by depositing in a United States Post Office three copies thereof in a duly addressed envelope with first class postage prepaid addressed to William J. Baird, Baird and Baird, attorneys, Post Office 351, Pikeville, Kentucky 41501, their attorneys of record.

3. On Shelby T. Denton, Chairman, Alfred A. Naff, George B. Simpson, Clyde Mullins, and Glen Schilling, Members comprising the Workmen's Compensation Board of Kentucky, and Ed E. Hancock, Attorney General of Kentucky, by depositing in a United States Post Office three copies thereof in a duly addressed envelope with first class postage prepaid addressed to Thomas R. Emerson, Assistant Attorney

General, Capitol Building, Frankfort, Kentucky 40601, their attorney of record.

4. On The Honorable Robert H. Bork, Solicitor General of the United States, amicus curiae, by depositing in a United States Post Office three copies in a duly addressed envelope with first class postage prepaid addressed to The Honorable Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D. C. 20530.

5. All parties required to be served have been served.

C. KILMER COMBS
Attorney for Appellants

Supreme Court, U. S.
FILED
FEB 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

File No. 74-1623

CHESTER SLONE, ET AL ..... APPELLANTS

VS:

DESKINS BRANCH COAL CO., ET AL..... APPELLEES

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

SUPPLEMENTAL MEMORANDUM FOR APPELLANTS

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MAY IT PLEASE THE COURT:

The lapse of time makes us wonder if deference to *Dunlop* v. *Turner Elkhorn Mining Co.*, No. 74-1032, and *Turner Elkhorn Mining Co.* v. *Dunlop*, No. 74-1316, is a factor. If so, we would point out one erroneous assumption by the Solicitor General in footnote 3, page 4 of his Memorandum for the United States.

He asserts, "If the federal program should be invalidated, then appellants would be eligible for the higher benefit schedules under state law, and

their equal protection argument would be moot." This is not so.

The plaintiffs are 1973 claimants and their cases have become final under state law. Up to now they have received the discriminatory benefits. If the judgment below is summarily affirmed, this Court will in substance approve the discrimination applied by the Kentucky Workmen's Compensation Board and upheld by the Kentucky Courts. The principle of res adjudicata would apply and time would bar vacating the awards. Appellees so asserted below.

The sole remedy would be individual motions to re-open filed separately before the Kentucky Workmen's Compensation Board on the ground of mistake of law under KRS 342.125, and these would have prospective effect only under subsection (1) with questionable practical results.

Appellants, the 1973 claimants as a class, can obtain practical relief only by reversal with directions to proceed as a class action. 1974 and 1975 claimants are now in the same bind. Only by injunctive relief below can the Kentucky Workmen's Compensation Board be required to revise the awards and rectify the discrimination.

Respectfully submitted,

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Supreme Court, U. S.
FILED
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

SECOND SUPPLEMENTAL MEMORANDUM FOR APPELLANTS

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FOR THE EASTERN DISTRICT OF KENTUCKY

SECOND SUPPLEMENTAL MEMORANDUM FOR APPELLANTS

MAY IT PLEASE THE COURT:

Appellants feel it is their responsibility to the Court to report legislative changes in the area in controversy. While not affecting appellants, the 1976 Kentucky Legislature enacted workmen's compensation legislation, known as House Bill No. 568, reducing the discriminatory effect for claimants last injuriously exposed in the coal mines on or after July 1, 1976. It reads in pertinent part as follows:

"SECTION 11. A NEW SECTION OF KRS CHAPTER 342 IS CREATED TO READ AS FOLLOWS:

This Act, and the other sections of KRS Chapter 342, shall be effective on July 1, 1976, for all claims based upon an injury or last exposure which occurs on or after that date; provided, however that in the event the Federal Coal Mine Health and Safety Act provides that claims covered by the provisions of KRS Chapter 342 may also be filed with a federal agency, then, in that event, the increase in benefits provided by Chapter 78, 1972 Acts shall not apply to any individual claim under KRS Chapter 342, if benefits are awarded to and are received by that particular claimant under such federal law. The benefits under the law in effect prior to the effective date of Chapter 78, 1972 Acts shall apply to that claim and appropriate credit shall be given for any payments made in excess of the benefits provided for under that act. Anyone who files a claim under this Chapter for coal-workers pneumoconiosis or silicosis benefits must also file and pursue in good faith a claim under the Federal Coal Mine Health and Safety Act.

Section 12. KRS 342.330 and Section 37, Chapter 78, 1972 Acts of the General Assembly are repealed."

Since appellants (1973 claimants) and all claimants prior to July 1, 1976, will not benefit, this appeal is not affected.

The substance of this enactment, effective July 1, 1976, is that:

(1) *Mere eligibility* to receive Federal Black Lung Benefits will not deprive the individual coal miner of increased workmen's compensation benefits equal to all other recipients.

(2) Only individuals *actually receiving* Federal Black Lung Benefits will be deprived of the increased compensation.

(3) If increased compensation is paid and the individual coal miner is later awarded Federal Black Lung Benefits, "appropriate credits" are given retroactively to reduce benefits to that coal miner over the period covered to eliminate the increase.

(4) The coal miner is required to file and pursue a claim for Federal Black Lung Benefits (even if only partially disabled).

The thrust of this new legislation is to insure benefits on *either* the Federal Black Lung level *or* the Kentucky Workmen's Compensation level, with the coal miner required to "pursue in good faith" a Federal Black Lung Claim. And if awarded federal benefits, he cannot receive the increased state benefits. This enactment follows the judicially noted intent to favor the Kentucky coal industry as long as the federal program is paying the bill.

Respectfully submitted,

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